

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-2105

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. T 4708

In the Matter of the Application
of

DEIDRE SMITH,

Petitioner-Appellant,

for a Writ of Habeas Corpus

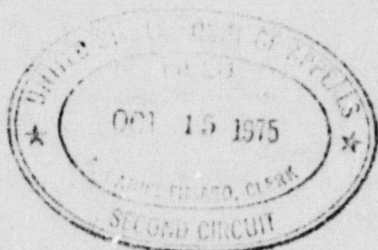
- against -

JANICE P. WARNE, Superintendent,
Bedford Hills Correctional Facility
of the State of New York,

Respondent-Appellee.

JOINT APPENDIX ON APPEAL

FREDERICK J. LUDWIG
Attorney for Petitioner-Appellant
Suite 4419, 60 East 42d St.
New York, N.Y. 10017
Tel. 212 MU 7-4990



United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. T 4708

In the Matter of the Application
of

DEIDRE SMITH,

Petitioner-Appellant,

for a Writ of Habeas Corpus

- against -

JANICE P. WARNE, Superintendent,
Bedford Hills Correctional Facility
of the State of New York,

Respondent-Appellee.

J O I N T A P P E N D I X O N A P P E A L

FREDERICK J. LUDWIG
Attorney for Petitioner-Appellant
Suite 4419, 60 East 42d St.
New York, N.Y. 10017
Tel. 212 MU 7-4990

PAGINATION AS IN ORIGINAL COPY

INDEX

	PAGE
General Docket.	1
Order to Show Cause for Leave to Issue Writ .	2
Verified Petition for Writ of Habeas Corpus .	3
APPENDIX A - Order of State Appellate Division, Second Department, Dispensing with Printing . .	30
APPENDIX B -Order of State Appellate Division, Second Department, Affirming Judgment of Conviction Without Opinion. . .	32
APPENDIX C -Certificate Denying Leave to Appeal by Associate Judge, State Court of Appeals. . .	35
APPENDIX D -Transcript of Testimony of Officer Drexel at Trial. . .	36
APPENDIX E -Affidavit of Petitioner Made Before Trial in Support of Her Motion to Dismiss and Suppress.	83
APPENDIX F -Docket Entries in Petitioner's Case in the County Court, County of Westchester. . . .	88
APPENDIX G -Indictment No. 242-71, County of Westchester, People of the State of New York against Deidre Smith.	94
APPENDIX H -Opinion of County Judge George D. Burchell, County Court, County of Westchester, on Motion to Suppress and Dismiss.	96
APPENDIX I -Opinion of County Judge John C. Couzens, County Court, County of Westchester, on Motion to Suppress and Dismiss.	98
Answer	107
Verified Traverse to Answer.	111

INDEX

	PAGE
Memorandum of Former District Judge Tyler Denying Application for Leave to Issue Writ Without Any Hearing.	113
Notice of Motion to be Relieved of Order of Former District Judge.	123
Notice of Appeal to the Court of Appeals. . .	125
Verified Petition for Certificate of Pro- bable Cause to Appeal.	126
APPENDIX A.	146
APPENDIX B.	147
APPENDIX C.	148
Order of District Court Granting Certificate of Probable Cause to Appeal.	149
Forma Pauperis	
Notice of Motion.	150
Affirmation.	151
Affidavit.	152
Order of the Court of Appeals Granting Leave to Proceed in Forma Pauperis.	155

T

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

CASE NO. 75-2105

Deidre Smith v. Janice P. Warne, Supt.

DATE	FILINGS—PROCEEDINGS	Filed
5-5-75	Filed copy of docket entries and notice of appeal.	
5-12-75	Frederick J. Ludwig Filed Form C	
5-12-75	Frederick J. Ludwig Filed Form D	
6-18-75	Received record (Original papers of District Court)	
7-7-75	Received supplemental record (Original papers of District Court)	
7-21-75	Filed motion for leave to proceed in forma pauperis and assignment of of counsel w/pfs.	
7-28-75	Received supplemental record (original papers of district court)	
7-28-75	Filed order granting motion for leave to proceed in forma pauperis and for assignment of counsel	
7-28-75	Filed record & supplemental (original papers of District Court)	
8-26-75	Filed CJA-20 appointing Frederick J. Ludwig counsel for appellant Copies to A.O. and counsel	
8-28-75	Filed order; appellant's brief and joint appendix by 10-6-75 w/dis- missal in default; appellee's brief by 11-5-75; argument to be ready week of 11-24-75	

2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application

74 CIV. 4399

of

DEIDRE SMITH

ORDER TO SHOW CAUSE FOR

for a Writ of Habeas Corpus

WRIT OF HABEAS CORPUS

- against -

JANICE P. WARNE, Superintendent,
Bedford Hills Correctional Facility
of the State of New York,

Respondent.

Upon the annexed copy of a verified petition for a writ of habeas corpus, the original of which has been filed in this Court,

It is hereby ORDERED that the respondent or his attorney show cause before a Judge of this Court at the United States Courthouse, Foley Square, New York, N. Y., in Room 619, at 4:30 P.M., on October 11, 1974, or as soon thereafter as counsel may be heard, why an order should not be entered directing that a Writ of Habeas Corpus be issued against the respondent, and for such further relief as the Court may deem proper; and

It is further ORDERED that a copy of this order together with the papers upon which it is granted be personally served upon the respondent or his attorney on or before 4:30 P.M., October 8, 1974, and that such service shall be deemed good and sufficient service.

Dated, New York, N.Y.
October 7, 1974

/s/ H.R. TYLER, JR.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

In the Matter of the Application :

of :

DEIDRE SMITH :

for a Writ of Habeas Corpus :

- against - :

JANICE P. WARNE, Superintendent, :

Bedford Hills Correctional Facil- :

ity of the State of New York, :

Respondent. :

74 CIV. 4399

VERIFIED PETITION

-----x

The petition of DEIDRE SMITH respectfully shows:

FIRST. The petitioner is confined in the Bedford Hills Correctional Facility of the State of New York, located at No. 247 Harris Road, County of Westchester, State of New York, within the territorial limits of the United States District Court for the Southern District of New York. The respondent, JANICE P. WARNE, is Superintendent of that Facility.

SECOND. The petitioner respectfully advises this Court that her confinement and imprisonment flatly violates a multitude of provisions of the Constitution of the United States of America. Specifically, the petitioner insists and maintains that her confinement and imprisonment are in defiance of the Constitution in these respects:

¶ The due process clause of Amendment. XIV.;

¶ The privileges and immunities clause of the same Amendment;

¶ The equal protection of the laws clause, same Amendment;

¶ Amendment. IV., guaranteeing the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, as that Amendment has been made applicable to governmental action by States or their political subdivisions, under the Fourteenth Amendment;

¶ Amendment. V., prohibiting that any person be compelled in any criminal case to be a witness against himself, as made applicable to the States by the Fourteenth Amendment; and

¶ Amendment. VI., guaranteeing that ~~the~~ accused shall enjoy the right to have the Assistance of Counsel for his Defence, as made applicable to the States by the Fourteenth Amendment.

THIRD. The State governmental action causing the confinement and imprisonment of the petitioner occurred as follows:

Petitioner was subjected on February 26, 1973 by the Honorable John C. Couzens, County Judge, County of Westchester, State of New York to "an indeterminate sentence as to each count to be served concurrently, the maximum term of life imprisonment and the minimum period of imprisonment of fifteen years" (*T.1176), after trial in the County Court, County of Westchester before the same Judge and a jury, and a verdict of guilty on each of two counts of an indictment, No. 241-71, charging her with the crime of possession of a dangerous drug in the first degree.

Upon appeal to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, that tribunal on March 20, 1973 entered an order dispensing with printing [APPENDIX A, post]. On February 11, 1974, that tribunal entered an order affirming the conviction, without opinion. ___ A D 2d ___ [APPENDIX B, post].

On March 6, 1974, leave to appeal to the highest court of the State was denied by the Honorable Sol Wachtler, Associate Judge, Court of Appeals, State of New York.

___ N Y 2d ___ [APPENDIX C, post].

FOURTH. The case against petitioner for possession of dangerous drugs arose out of the murder of one Bobby Madden in the public corridor outside his apartment, No. 15 A, 1841 Central Park Avenue, Yonkers, New York, at about 1:30 A.M., January 24, 1971 and the response of the police to the scene of the homicide. The homicide remains unsolved.

FIFTH. There were two eye witnesses to the murder: Hannah Futuro who was leaving apartment 15 M at the north end of the corridor, accompanied by Sheila Altman (S.149-50*). Both saw "the door to 15 A opened and she [Hannah Futuro] spotted and she or they stood there and they recognized the occupant as Madden" (S. 150). Madden "was in the process of closing the door" when "a second male emerged and struck Madden and shot him and then continued in a southerly direction in the hallway until he dropped"(S.150).

SIXTH. Besides the evidence of two eye witnesses, real evidence confronted police arriving on the scene. The public hallway on the fifteenth floor comprised an area of 120 feet in length, running in a north-south direction, and seven feet in width (T.77**). Sixteen apartments, three elevator banks in the center, and one stairwell opened on the public area (T. 77-78). Apartment 15 A was immediately to the right of one of the elevators on the east side of the hallway (T.79). Officer Drexel was one of two uniformed police officers who arrived first on the scene. Drexel was not called as a witness at the suppression hearing. Drexel's testimony at the trial is set forth in APPENDIX D, post. Drexel described the physical scene on his arrival. "[T]he body;" "I would say thirty feet

*Reference to "S" are to typewritten page numbers of the transcript of the suppression hearing held on Dec. 18-22, 1972.

**Reference to "T" are to typewritten page numbers of the transcript of the trial.

from the elevator, maybe fortyfeet * * * lying face down.
 * * * [T]here was a weapon there * * * I think it was an
 automatic, I am not to [sic] sure, it was lying on the
 side of his body * * * on the left side. No [the arm and
 hand of deceased werenot near the weapon] it was sort of in
 the middle when I first seen it. Yes, we observed 5 spent
 shells, empty shells which was marked by the detective with
 chalk * * * all the way down the corridor. * * * No sir [he
 did not look into the stairwell between the second and third
 elevators and investigate to see if there was anything around].
 * * * No sir [he did not look around the hallway for anything
 that might be a weapon]." (T. 364-68). Drexel spent between
 two and one-half andthree hours at the scene (T.368).

SEVENTH. The facts confronting the police were that:

- [i] Madden was the victim of a criminal homicide;
- [ii] The criminal agency were gunshot wounds;
- [iii] The murder weapon and five of its spent shells
 lay in open view in the public hallway; and
- [iv] The homicide was in fact witnessed by two women
 who were able to identify the perpetrator as a
 male.

EIGHTH. Accordingly, both detectives who assumed charge of the investigation upon their arrival could find no basis for suspicion of petitioner. Joel Parisi, then a Yonkers Police Department narcotics squad detective but demoted to the uniformed patrol force following this case, was the first detective on the scene, and testified, "Deidre at no time during that part of the investigation was any kind of a suspect whatsoever" (S.202). Detective Stanley Stypulkowski, arriving later at "one fifty-five or two" on that morning (S.119), repeatedly testified at the trial that petitioner Deidre Smith was "Not really a suspect, no sir" in the homicide (T. 155); that there never was a time when she was considered a suspect, "No sir, not to me" (T. 155); and that "she was not a suspect at that time in my estimation" (T. 156).

NINTH. Events immediately preceding Bobby Madden's fatal exit from apartment 15 A into the public hallway were recounted in the testimony of the only other person in the apartment, petitioner Deidre Smith. Twenty years old and pregnant at the time, petitioner had been lying in bed watching television with Bobby Madden since about 8.30 P.M. (T. 1239). At eleven o'clock Bobby announced that he was going downtown but was not yet ready to leave (T. 1240). He remained in bed until about 1.30 A.M. when he arose and dressed (T. 1240). Madden, in his last words before leaving the apartment, rejected petitioner's offer to accompany him:

"[Y]ou have been complaining about you have been so sick so just stay here and wait until I get back. I will be back in an hour. I am coming right back. So just wait until I come back" (T. 1241). Petitioner remained in bed for a few minutes after Madden left, then arose to get something to eat in the kitchen, heard a commotion in the hallway, looked through the peephole, put on clothing after hearing a black man had been shot (Madden was the only black tenant in the sixteen apartments on the fifteenth floor), and left to discover that Bobby Madden was that man (T. 1243-45).

TENTH. According to the testimony at trial of petitioner, she went back to apartment 15 A, put on her coat, took a locked box in which Madden kept his money and papers from a closet in his den, left the apartment and entered the elevator from which the first two police officers responding to the homicide had just emerged. "They like turned back around and pressed the elevator button and then I was out like back out into the corridor again and by this time I think I just collapsed to my knees and I said let me go to his mother's. Please just let me go to his mother's. And so then the two policemen, they both pulled me up, they picked me up arm in arm just like an easy pickup one on each side"(T.1246-50). According to the testimony at trial of Yonkers Police Officer Joseph D. Drexel (who did not testify at the pre-trial suppression hearing), "And now there was a crowd in the corridor and someone yelled out. Stop that woman, that's his wife. So I grabbed the woman and detained her" (T. 336). She was struggling as the police officer took her physically, "Because I was grabbing her" (T. 345).

ELEVENTH. Having seized the body of petitioner, Officer Drexel forcibly removed her to a place of detention, confined her there and subjected her to interrogation. "Right," Officer Drexel testified that he took petitioner physically into another apartment on the same floor, No. 15 B (T.345). "I was waiting for my superiors and you know the door was closed after I put her in there. I closed the door" (T.347). Officer Drexel stayed right with petitioner and began his interrogation. "Yes, I didn't ask her, I didn't ask to [sic] much. And well I asked her. Did anybody come to the door, did she see anything and she stated no" (T.346).

TWELFTH. Thereafter, petitioner was transferred again, this time from apartment 15 B to 15 A. During his interrogation of petitioner, Officer Drexel determined that she lived in apartment 15 A (T.364). When Lieutenant Frank Sardo, promoted to deputy chief of police in the Yonkers Police Department (T. 250) and Sergeant Michael D'Ambrosio of the same Department arrived in apartment 15 B, Joel Parisi, then a detective assigned to the narcotic squad in the Department but demoted after this case to patrolman (S. 189), was already there (T. 365). Officer Drexel testified, "I told them [Sardo and D'Ambrosio] that she lived in 15 A" (T.364). The circumstances surrounding the transfer of Deidre Smith from 15 B to 15 A were described by Officer Drexel who was with her physically when she went accompanied by Sardo, D'Ambrosio and Parisi (T. 363-65). "Yes, sir," it was at somebody else's

order that Deidre Smith went from 15 B to 15 A. "When they [Sardo and D'Ambrosio] came I told them the situation and I told them she lives in A, 15 A, and they said okay will [we'll] take her into 15 A and that was the end of it". "That's right," to the best of Officer Drexel's recollection, the substance of the conversation was, "Okay we will take her over to 15 A" (T. 366).

THIRTEENTH. According to the affidavit of petitioner made before trial in support of her motion to dismiss and suppress [APPENDIX E, post], "I did not invite the police into my apartment [15 A] and in point of fact when I questioned the police officer what he was doing in the apartment he said he had a right to be there because there had been a murder in the hallway."

FOURTEENTH. Officer Drexel stood guard over petitioner from the time of his physical removal of her from the elevator to apartment 15 B, during her detention in 15 B, during her removal from 15 B to 15 A, and during the first "Two to three minutes" of her detention in 15 A (par. TENTH, ELEVENTH, TWELFTH, ante; T.362*). The initial other police officers entering 15 A variously explained their manner of ingress:

¶ Sergeant D'Ambrosio: "I followed him [Lieutenant Sardo] in [to 15 A]. "Yes", a police officer let him into the apartment. "I remember a Sergeant Connally [Yonkers Police Department emergency squad] being there, Sergeant Connally was the one there and he let him in" (S.173). Sergeant Connally "was in the hallway". "Yes," Sergeant Connally was between Sardo and D'Ambrosio and the door when they entered (S.174).

¶ Lieutenant Sardo: "I observed Sergeant Frank Connally standing in the hallway in front of apartment 15 A" (S.7). "I don't recall which of the three admitted me" to apartment 15 A (S.10).

¶ Detective Parisi: "At one point I do remember him [Sergeant Connally] making a phone call from apartment 15 B" (S.207). "No," Parisi had no conversation with petitioner in 15 B with relation to his entering 15 A (S.226). "I followed her [petitioner] in maybe ten feet behind her" (S.210). "Yes", it was Parisi who invited Detective Stypulowski into 15 A (S.220).

¶ Detective Stypulkowski: "The door [to 15 A] was wide open and I looked in and I saw Diedra Smith sitting on the couch". "Detective Parisi was there, but I didn't see him until I came into the apartment" (S.99).

FIFTEENTH. Officer Drexel remained in 15 A briefly. "Yes,

I went to 15 A f approximately maybe 2 or 3 minutes" (T. 365).
"Like I said I was only there a couple of minutes * * *." (T. 367). "Two or three minutes" (T. *362). During that interval, he did no looking around or any investigating in connection with the homicide. "No sir, I just stood, I just stayed with Mrs. Smith" (T. 367). During the brief period, Officer Drexel observed police - in addition to the three who had entered with petitioner and himself - enter apartment 15 A. "I was only there a couple of minutes and then after a couple of minutes other men came in, uniformed, plain clothes men * * *"
"Yes all officers, right" of the Yonkers Police Department (T. *362). During the "couple of minutes", "Oh, maybe eight" additional officers entered, making the complement present in 15 A from the Yonkers department an even dozen (T. *362).

SIXTEENTH. During this two to three minute interlude when Officer Drexel "just stood" with petitioner in apartment 15 A that comprised six rooms (two baths and a den), "She was sitting down" on "a couch" in "the living room" (T. *364). "Yes sir," there was a lot of activity around her (T. *364). "Right," the "maybe eight" additional officers who had entered began searching the area (T. *362). "[T]hey were in the apartment opening drawers and stuff like that, going in the

closets like looking for the murder weapon." (T.367). "Yes sir," there were others in there looking around (T. 367). During the fleeting span during which Officer Drexel "just stayed" with petitioner seated on a couch in "the living room", the police exploration far transcended any search of her person, the couch on which she sat and the living room containing the couch. "They opened a few closets and were looking in the bedroom you know. I didn't observe, I know they were going through the rooms though." (T. *362).

"Right," Officer Drexel agreed, they were looking all over the place. (T. *362-63).

SEVENTEENTH. Detective Parisi was assigned to the search. "We were divided into two teams to search for a weapon. I searched the Den area * * * a small adjoining room which would appear to be like a den" (S.193-94). "Well this, when I searched the den area, the closet of the den area is where I found this" (S.194). "It was in a brown paper bag" (S.195). "Well I have it marked here as three thousand three hundred and ninety bags of heroin" (S.195). This evidence was held non-suppressible and admitted at trial against petitioner.

EIGHTEENTH. As sworn to in petitioner's affidavit in support of her motion to dismiss and suppress. "At no time during the entire period did I authorize nor [sic] invite the police into my apartment nor did I at any time consent to any search of myself or the premises nor did the police show me any warrant or authorization to make such search"

[APPENDIX E, post, at p.2]. No claim has ever been made in this proceeding that any warrant to search or seize any person, things, papers or effects was ever issued in this case.

NINETEENTH. In addition to interrogation by Officer Drexel in apartment 15 B [par. ELEVENTH, ante], petitioner swore in her affidavit in support of her motion to dismiss and suppress, "I remained in my apartment from approximately 2:15 or shortly thereafter until approximately 4:00 A.M. under constant surveillance of different police officers who continued to question and interrogate me in relation to the homicide. * * * After my removal to the station house, interrogation continued until 1:00 P.M. of that day" [APPENDIX E, post, at p.2]. With respect to interrogation of petitioner in apartment 15 A, Officer Drexel testified, "I think Detective Parisi and Detective Stypulkowski were questioning her, but after that I had no communication with her at all" (T.363*). With respect to his questioning petitioner in 15 A, Detective Parisi testified, "Right", after entering 15 A he took notes of questions and information along with Patrolman Drexel (S.229). "I threw the notes away" (S.229).

NINETEENTH-A. Throughout the entire period on January 24, 1971, beginning at about 1:45 A.M. when her person was seized at the elevator by Officer Drexel, during the time of her removal from the elevator to apartment 15 B, during her detention and interrogation by Officer Drexel in apartment 15 B, during her removal from 15 B to 15 A at about 2:15 A.M., during

her detention and interrogation in 15 A from that time until about 4:00 A.M., during her removal to the police station house, and finally during her detention and interrogation there for about eleven hours until about 1:00 P.M., petitioner swore in her affidavit in support of her motion to dismiss and suppress, "I was not advised at any time of my right to remain silent, of my right to contact an attorney, and if I could not afford one, to have one appointed on my behalf, or any other of the constitutional protections" [APPENDIX E, post, p.3]. For the periods until her removal to the station house, no claim by the police has been made that petitioner was advised of such rights. With respect to the period of detention and interrogation in 15 A, Detective Parisi testified that "There was no reason for it, she wasn't a defendant" so far as he may have indicated to the petitioner that she had certain constitutional rights (S.222). "No," Detective Parisi testified that at this stage no one in his presence or hearing or to his knowledge advised the petitioner that she had certain constitutional rights (S.222).

TWENTIETH. During her detention and interrogation in 15 A, petitioner was seated on a couch in the living room except for several visits to the bathroom, one to the kitchen and another to the bedroom. Lieutenant Sardo testified that "[T]he first place that I went to was the bathroom with Miss

Smith and I glanced around the bathroom and I took a look at the vanity and I said to her, do you mind if I open the bottom, and she said no go ahead and I opened the bottom and there was a top of a hat box and in it was marijuana and a cigarette or what we refer to as a joint" (S.13). "I bent over to pick it up and at this time she said simply. You are not going to get chicken and bust me over this are you and I said I am afraid I will have to" (S.14). Upon this first announcement of a criminal charge against petitioner after her seizure and detention by the police, no advice was given her about her constitutional rights and no claim is made by the police that any was given.

TWENTY-FIRST. With respect to the significance of the restrictions imposed by the police upon petitioner's freedom of action in 15 A during her detention and interrogation there, the police testified as follows:

¶ Lieutenant Sardo: [Immediately following his announcement of the criminal charge] "Well, we had a little further conversation which I can't recall. Then she asked to use the phone and I said go right ahead and I accompanied her to the kitchen and she called up Thelma Grant [petitioner's girlfriend]. I was there, yes" and listened to the conversation. "She told her what had transpired, what happened to Bobby and she told her to come up" (S.14).

"[A]nd we were continuing a little further and she asked to use the bathroom again. Well I said, go right ahead considering what her condition was supposed to be. * * * I asked her not to lock the door at this point and I think that she left it slightly ajar. Just a trifle open and I asked the sergeant to stand there in front of it, just in case assuming I hadn't all of the facts now and I didn't know what she would do or any possibility of her doing something. I wanted to make sure that we could get there if something transpired. With that, the toilet began flushing and the shower started to go. * * * [A]fter a few minutes had gone by one of the detectives knocked on the door and asked her to come out. * * * She said she had nothing to put on and she asked for a robe." (S.15-16).

"The three of us, Thelma, Deidre and myself" were in the bedroom. "She [petitioner] was going through the changing routine again and she asked me if I would be kind enough to at least turn my back. I turned my back, but I could see her through the window, it was dark and you could see the reflection. She asked her girlfriend to hold the coat in front of her while she changed" (S.20).

¶ Detective Stypulkowski: "Well, we attempted to speak to Diedra Smith to get some information as to what possibly had happened. And she told us she didn't know and and at this point she asked to use the bathroom, which she was permitted to do. Then she came out and we attempted to talk to her again * * *" (S.99).

"Then again we tried to speak to Diedra Smith and again she wanted to use the bathroom. She was permitted to use the bathroom again and then she exited the bathroom and then she asked the lieutenant if she would be permitted to make a telephone call. Which she was permitted to do in the kitchen" (S.101).

"Then we attempted to talk to her again and then she wanted to go to the bathroom again. * * * Well, she went into the bathroom and she was instructed not to lock the door, so she closed it and it was just, it was closed but not where the tongue of the lock was engaged you know. And we remained in the foyer and water was running and the bath room flushed and the shower was running. And at this point, I knocked on the door and insisted that she come out" (S.101).

TWENTY-SECOND. There was no probable cause for the seizure of petitioner's body and certainly none for her prolonged detention in 15 A. Both detectives who assumed charge of the investigation upon their arrival could find no basis for suspicion of petitioner [par. EIGHTH, ante]. Lieutenant Sardo, arriving later on the scene, while proclaiming that "Everybody is a suspect to me," and that petitioner fitted into that category (S.43), admitted, "No, I didn't have anything specific to to hang my hat on" (S.52).

TWENTY-THIRD. The seizure and detention of petitioner was in no sense an investigative stop for which the police reasonably concluded that petitioner might have been armed and dangerous; where nothing in the initial stages of their encounter with petitioner served to dispel their reasonable fear for their own or others' safety; where, for the protection of themselves and others in the area, they conducted a carefully limited search of the outer clothing of petitioner in an attempt to discover weapons which might be used to assault them; and where weapons seized were introduced in evidence against petitioner. "No," Lieutenant Sardo testified that he was not even tempted by the possibility that petitioner was carrying a concealed weapon, and "No, Sir," he did not cause her to be searched (S.44). Although a search of 15 A after petitioner was taken to the police station house turned up "rifles and hand guns" (S.42), there was no charge made that petitioner had possession of them, and they were not introduced in evidence against her.

TWENTY-FOURTH. The seizure and detention of the person of petitioner as a potential material witness was accomplished without the prior judicial approval mandated by the governing statute then in force and effect. Not until eleven days later

on February 1, 1971, was application made by an assistant district attorney of the County of Westchester before the Honorable George Beisheim, Jr., Judge of the County Court of that County, to hold petitioner "as a material witness and bail be fixed in the sum of \$1,000,000.00". The Court set bail at \$100,000.00 and remanded petitioner [APPENDIX F, post, p.1]. Upon information and belief, this order had no retroactive effect and did not in any manner validate the seizure and detention of the person of petitioner by the police on January 24, 1971.

TWENTY-FIFTH. Fifty-one days after the seizure and detention of her person, petitioner was first accused of criminal possession of a dangerous drug by indictment of the grand jury of the County of Westchester handed up on March 16, 1971 in the County Court of that County before the Honorable George D. Burchell, County Judge [APPENDIX F, post, p.1]. Upon information and belief, the statute then in force and effect made criminal the criminal possession of a dangerous drug in the first degree by knowing and unlawful possession of "substances of an aggregate weight of sixteen ounces or more containing" prohibited drugs. The indictment covering the possession of "sixteen ounces or more" charged two separate crimes, and not one, in two identically worded counts [APPENDIX G, post].

TWENTY-SIXTH. Upon information and belief, the seizure and detention of petitioner's person on January 24, 1971 flatly violated the provisions Amendment. IV. of the Constitution

of the United States as that Amendment has been made applicable to governmental action by States or their political subdivisions under the Fourteenth Amendment. By dint of that seizure and detention, petitioner's physical presence was assured in 15 A at the time the police conducted a search of areas other than the room in which petitioner was present and after she had been physically removed from the apartment and taken to the police station house. The evidence seized upon that search constituted the proof introduced against petitioner at trial and on the basis of which petitioner was found guilty. On appeal, in its submitted brief (the prosecutor declined oral argument, see APPENDIX B, post) it was argued on behalf of the People that "the defendant knowingly possessed the heroin and cocaine. 'Knowledge, of course, may be shown circumstantially * * *. Generally, possession suffices to permit the inference that the possessor knows what he possesses especially, but not exclusively, if it is * * * on his premises' " [Respondent's Brief, p. 13, Appellate Division, Second Department]. The unlawfully compelled presence of petitioner in the living room of 15 A while hordes of police rummaged closets in other rooms was a primary illegality. The evidence searched for and seized and introduced at trial against petitioner was the 'fruit of the poisonous tree' . Upon information and belief, this is the case not only because this evidence would not have come to light but for the illegal actions of the police, but also because it has been come at by exploitation of that illegality. Nearly fifty years ago, Judge Learned Hand wrote:

"After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home."

TWENTY-SEVENTH. Search of closets and rooms in 15 A other than the living room where petitioner was seated on a couch occurred. Detective Parisi was assigned to search the den, "a small adjoining room which would appear to be like a den," and "searched the den area, the closet of the den area is where I found this" - 3,390 bags of heroin, the most incriminating evidence introduced against petitioner at trial [par. SEVENTEENTH, ante]. "[T]hey were in the apartment opening drawers and stuff like that, going in the closets like looking for the murder weapon," testified Officer Drexel who had only been present during the first two to three minutes of petitioner's detention in 15 A. "Right," he said, they were looking all over the place [par. SIXTEENTH, ante]. Detective Stypulkowski testified that he searched the bedroom, found a cellophane bag with white powder there and this was introduced in evidence against petitioner (S.103-04). Lieutenant Sardo testified, "When she went into the bedroom, I went into the bathroom" and there searched the drain of the toilet and shower. He found a "white residue" which, although

never shown to be a narcotic substance, he was permitted to give testimony about (S.16). Upon appeal, in its brief submitted without oral argument, the prosecution insisted that the police "certainly had the right to search the three rooms of the apartment for evidence of both the crimes of Murder and Possession of a Dangerous Drug (United States v. Rabinowitz, 339 US 56; * * *)." [Respondent's Brief, p.10, Appellate Division, Second Department]. Upon information and belief, the case relied upon as authority for the multi-room search of 15 A has been overruled.

TWENTY-EIGHTH. In addition to the warrantless search of rooms in 15 A other than the one in which petitioner was located, the search continued after petitioner was removed to the police station house. After petitioner was taken out to Sprain Road (police station), Lieutenant Sardo testified, "There was a detailed search by the detectives and other patrolmen were called in" (S.21). After she left the apartment, Lieutenant Sardo "Continued with the search with the rest of the personnel" (S.52). Numerous articles were then found and introduced in evidence against petitioner (S.52). After she left the apartment, "I glanced through the closets at this point. We had ample assistance and the detectives were making a thorough search" (S.75).

TWENTY-NINTH. According to police testimony, petitioner resisted the initial seizure of her person. She was struggling, Officer Drexel testified, "Because I was grabbing her" [par. TENTH, ante]. She also objected to searches made when they occurred in her presence in the living room. Lieutenant Sardo testified that she objected to "Another lieutenant who was picking up the couch or something" (S.74), "[H]e was lifting it." (S.75). But the same officer interpreted his own status quite differently. "I was invited to look anywhere" (S.58). Accordingly, he testified, "Yes", he went into the bedroom while petitioner was there (S.58). "She was undressing and dressing" (S.58). "She was taking off this Polka dot blouse again and the slacks. I believe she was putting the same articles of clothing on, but put under clothes on this time or something" (S.59). Repeatedly, to use the bathroom or to telephone her girlfriend from the kitchen, police permission had to be sought by petitioner [par. TWENTY-FIRST, ante]. Entry to petitioner's living quarters, which was the beginning of the search, was demanded under color of office. From the outset, a dozen police officers were present in 15 A. Resistance to their movements and demands by the lone petitioner would have been futile. Any failure to resist was in submission to overwhelming authority rather than any understanding and intentional waiver of a constitutional right. Upon information and belief, the ultimate test of voluntariness - the same test used to determine the admissibility of confessions - has recent-

ly been made to govern any supposed consent. Any acquiescence by petitioner was not the product of an essentially free and unconstrained choice by its maker. Her will had been overborne and her capacity for self-determination critically impaired.

THIRTIETH. Petitioner's motion to suppress and dismiss was granted in part on consent of the prosecution pending a hearing before trial, and denied in part, in an opinion, otherwise unreported, rendered on June 2, 1971 by the Honorable George D. Burchell [APPENDIX H, post].

THIRTY-FIRST. A hearing on petitioner's motion to suppress was held before the Honorable John C. Couzens, County Judge. The Judge presiding at the outset candidly placed on the record, "that I have been informed that several police officers from the City of Yonkers will be called as witnesses in this hearing. That having spent upward of ten years in the City Court of Yonkers, I am personally with the police officers and am socially acquainted with at least one of them" (S.2). A critical issue in the hearing on suppression was which occupant - the deceased Bobby Madden or petitioner, his twenty-year old pregnant girlfriend - had dominion and control over the narcotic drugs that might have been seized after search of apartment 15 A. Lieutenant Sardo had testified that Bobby Madden "had a previous history of involvement in narcotics", and that there had been "some mention of it later that night by someone" (S.60). But on cross-examination of the detective from the narcotics squad present on the scene, Joel Parisi,

objection was twice sustained to inquiry by counsel for petitioner on whether Madden had a record for dealing in narcotics (S.228). By decision dated December 29, 1972, with opinion otherwise unreported [APPENDIX I, post], petitioner's motion to suppress was denied. "This Court is mindful that while it sits back discussing the legal niceties of those events it must never loose [sic] sight of the fact that the events of that evening were not calm, but rather, chaotic. * * * Her consent was freely and voluntarily given. * * * All statements made by her were not made while she was in any sense of the word 'in custody'. She had freedom of movement and contact with friends and neighbors."

THIRTY-SECOND. Throughout the trial and upon summation, the prosecutor - who had participated in the investigation - repeatedly made himself an unsworn witness over objection by defense counsel. For example, in summation referring to a lie detector test performed upon petitioner during her detention, "Deidre was not asked any questions to my knowledge I wasn't there, but I talked to him the man the state trooper who did it and he said he did not ask any questions about drugs and that is all I will say your Honor * * *." (T1588). Upon information and belief, this prosecutorial misconduct is sufficient in and of itself to sustain the Great Writ without appellate redetermination, as the highest court has most recently pointed out.

THIRTY-THIRD. Petitioner, through counsel, has now exhausted all remedies by appeal or otherwise before the courts of the State of New York.

THIRTY-FOURTH. Petitioner is neither committed nor detained by virtue of any judgment, order, mandate or process, except as herein stated.

THIRTY-FIFTH. No previous application for the relief sought herein has been made to this Court or any Judge thereof, or to any other Court or any Judge thereof.

THIRTY-SIXTH. For the purpose of informing the Court, petitioner states that Carl A. Vergari, Esq., District Attorney of the County of Westchester, was in charge of the prosecution, and that his office and post office address is the County Courthouse, White Plains, New York 10601.

WHEREFORE your petitioner prays that a writ of habeas corpus issue directed to the aforesaid JANICE P. WARNE, Superintendent, Bedford Hills Correctional Facility of the State of New York, commanding her to have the body of your petitioner, together with the cause of such imprisonment and restraint forthwith before this Court, and at that time petitioner be discharged from further imprisonment and restraint.

Respectfully submitted

/s/ DEIDRE SMITH

DEIDRE SMITH

Address: 27 Harris Road
Bedford Hills, N.Y.

/s/ FREDERICK J. LUDWIG

FREDERICK J. LUDWIG

Attorney for Petitioner

Address: 60 E. 42nd Street
New York, N.Y. 10017
Suite 2206

Tel. MU 7 4990
6380 [212]

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) Ss.:

DEIDRE SMITH, being duly sworn, deposes and says: That she has read the foregoing petition and knows the contents thereof. That the same is true to her own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters, she believes it to be true.

/s/ DEIDRE SMITH

Sworn to before me this
7th day of October 1974

STATE OF NEW YORK)
COUNTY OF NEW YORK) Ss.:

FREDERICK J. LUDWIG, being duly sworn, deposes and says: That he is the attorney for the petitioner herein, has read the foregoing petition and knows the contents thereof. That the same is true to his own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

/s/ FREDERICK J. LUDWIG

Sworn to before me this
7th day of October 1974

APPENDIX A

Order of the Appellate Division, Second
Judicial Department, Dispensing with
Printing

No. 2157

At a Term of the Appellate Division of the
Supreme Court of the State of New York,
Second Judicial Department, held in
Kings County on March 20, 1973

mc

HON. SAMUEL RABIN, Presiding Justice
HON. JAMES D. HOPKINS)
HON. FRED J. MUNDER) Associate Justices
HON. M. HENRY MARTUSCELLO)
HON. HENRY J. LATHAM)

The People of the State of New York,

Respondent,

v.

Deidra Smith

Appellant.)

Decision and Order -
Motion to Dispense
with Printing -
Appeal from Judgment

In the above-entitled action, the above-named appellant (defendant)
having appealed to this court from a judgment of the
County Court, Westchester County, rendered February 26, 1973
, and appellant having moved to dispense with printing;

Now, upon the papers filed in support of the motion and no
papers filed in opposition or relating thereto; and the
motion having been duly submitted and due deliberation having been
had thereon, it is

ORDERED that the motion is hereby granted.

The appeal will be heard on the original papers (including a typewritten certified transcript of the stenographic minutes) and on appellant's and respondent's briefs, which may be in legible typewritten form or in any other legible form authorized by this court's rules and which must comply with said rules (22A NYCRR 670.1 et seq.).

The parties are directed to file eight copies of their respective briefs and to serve one copy on each other.

Pursuant to statute (CPL 460.70), within the twenty-day period prescribed therein, the stenographer of the trial court is required to make, certify and file two typewritten transcripts of the stenographic minutes of the proceedings of the trial and sentence and the clerk of the trial court shall furnish one of such certified transcripts to appellant, without charge.

Appellant's time to perfect the appeal is enlarged to the September Term, which begins September 4, 1973 ; appeal ordered on the calendar for said term; appellant's brief must be served and filed on or before July 27, 1973 ; and respondent's brief must be served and filed on or before August 10, 1973.

Enter:

Defendant's address:
c/o Retained Counsel

IRVING N. SELKIN
Clerk of the Appellate Division
3/20/73 No. 2157

APPENDIX B

Order of the Appellate Division, Second
Judicial Department, Affirming Judgment
of Conviction Without Opinion

At a Term of the Appellate Division of the Supreme Court
of the State of New York, Second Judicial Department,
held in Kings County on February 22, 1973.

HON. FRANK A. GULOTTA, *Presiding Justice*

HON. JAMES D. HOPKINS

HON. M. HENRY MARTUSCELLO

HON. HENRY J. LATHAM

HON. IRVING SHAPIRO

HON. JOHN P. COBALANKE

HON. MARCUS G. CHRIST

HON. ARTHUR D. BRENNAN

HON. A. DAVID BENJAMIN

HON. FRED J. MUNDER

Associate Justices

The People of the State of New York,

Respondent,

v.

Deidra Smith, a/k/a Deidra Eversley,

Appellant

Order on Appeal from
Judgment of Conviction

In the above entitled action, the above named **Deidra Smith, a/k/a Deidra Eversley,**
defendant in this action, having appealed to this court from a judgment of the **County**
Court, **Westchester** County, rendered **February 26, 1973;**

and the said appeal having been argued by Otto F. Fusco,
Esq., of counsel for the appellant, and submitted by Janet Umard, Esq.,
of counsel for the respondent, and due deliberation having been had thereon; and upon this court's

decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby **unanimously affirmed.**

Enter:

Clerk of the Appellate Division

_____ A D 2d _____

A - January 14, 1974

1263 E

The People, etc., respondent, v.
Deidra Smith, a/k/a Deidra Eversley,
appellant.

Judgment of the County Court, Westchester County, rendered

February 26, 1973, affirmed. .No opinion.

GULOTTA, P.J., CHRIST, BRENNAN, BENJAMIN and MUNDER, JJ.,
concur.

FEBRUARY 11, 1974

PEOPLE v SMITH (DEIDRA)

1263 E

APPENDIX C

Certificate Denying Leave to Appeal
by Associate Judge, Court of Appeals

State of New York

Court of Appeals

BEFORE: HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

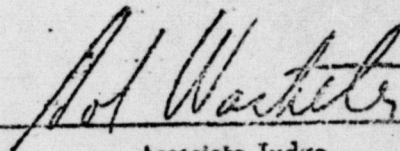
against

DEIDRA SMITH a/k/a
DEIDRA EVERSLEY

CERTIFICATE
DENYING
LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York,
March 6, 1974



Associate Judge

*Description of Order Judgment of County Court, Westchester, dated February 26, 1974.

APPENDIX D

Transcript of testimony of Officer
Drexel at trial

DATE: 1-16-73

TIME: 11:05

THE CLERK: Your Honor May I
call the roll?

THE COURT: You may.

THE CLERK: Bartow Hodge, Don
Gaston, Helen Maly, Geoffrey Fox, Terry E.
Morgan, Henrietta H. Adair, Maurine H.
Switzer, Helen Sardos, William M. Badolato,
Oren L. Bishop, Marshall F. Chapman,
Herbert B. Orlet, Janet S. Craft, John P.
Ibelli, Sara J. Greer. Your Honor the
jurors are all present and accounted for.
Are the People ready to proceed?

MR. CHRISTIANSEN: The People
are ready to proceed.

THE CLERK: The defendant ready
to proceed?

MR. FLORENCE: The defendant
is ready to proceed.

THE COURT: Mr. Christiansen,
you may call your next witness.

MR. CHRISTIANSEN: Your Honor
the People at this time call Joseph D.
Drexel.

THE CLERK: You do solemnly
swear in the presence of the ever living
God, that the testimony you are about to
give in this action between the People
of the State of New York and the Defendant
at the Bar, would be the truth and nothing
but the truth so help you God.

THE WITNESS: I do.

THE CLERK: Be seated please
and state your full name and address for
the record.

THE WITNESS: J O S E P H D.
D R E X E L, a witness herein, residing at
757 Warburton Avenue, Yonkers, New York
was duly sworn and testified as follows:

DIRECT EXAMINATION BY

ALFRED CHRISTIANSEN, A.D.A.:

Q Sir, what is your occupation?

A I am employed by the City of Yonkers as a
patrolman.

MR. CHRISTIANSEN: Will you kindly keep your voice up so I can hear you.

THE WITNESS: I am employed by the City of Yonkers as a patrolman.

Q For how long have you been employed as a patrolman in the City of Yonkers?

A Fourteen years.

Q Fourteen years?

A Yes.

Q Were you so employed on January 24th, 1971?

A Yes.

Q And what was your assignment on that day?

A. I was in a radio car, car 131 and I was on Central And Tuckahoe Road and I was assigned to go to 1851 on the 15th floor to respond to a sound of gun shots.

Q 1851 or 1841?

A 1841.

Q Approximately what time if you remember, what time did you get or were you requested to go to 1841 Central Park Avenue?

A I would say approximately--

MR. FLORENCE: Your Honor the

testimony is contrary to the question.

THE COURT: I will sustain the objection you will rephrase the question.

MR. CHRISTIANSEN: Patrolman Drexel, can you tell us what happened in the early morning hours on January 24th, 1971.

A I would say approximately around 1:30 or 1:35, we received a call in the radio car on Central and Tuckahoe for a report of shotgun.

Q Please speak slowly.

A I would say approximately between 1:30 or 1:45 a.m. we received a call over the radio in the radio car for reports of gunshots at 1841 Central Park Avenue on the 15th floor, and we responded.

Q And you responded?

A Yes.

Q And where were you when you received this communication?

A On Central and Tuckahoe, approximately 4 blocks away.

Q And from Central and Tuckahoe, how long did it take you to get to 1841 Central Park Avenue?

A Approximately 1 minute or two.

Q What did you do after you got to 1841 Central Park Avenue?

A We entered the building, got on the elevator and I went up to the 15th floor.

Q And when you got to the 15th floor, will you tell the Court and jury what you observed?

A Well me and my partner exited the elevator Patrolman Weisse exited the elevator and immediately we observed a body south bound in the corridor lying face down. A woman was in front of the elevator as she was going to get on she immediately turned to the left of the elevator and placed a box on to the floor approximately 3 feet away from the elevator. And now there was a crowd in the corridor and someone yelled out. Stop that woman, that's his wife. So I grabbed the woman and detained her.

Q And now where was, do you see the woman in Court who you detained on that night?

A Yes I do.

Q Will you point her out to the Court and the Jury?

THE WITNESS: That lady right there.

MR. CHRISTIANSEN: Your Honor
may the record indicate that the Patrolman
Drexel has identified the defendant.

Q When you said you detained the defendant,
where did you then take her?

A Due to the crowd in the apartment, I asked
the woman, may I use her apartment and I brought
her into 15B and her name was Sinkoff. She was very
hysterical and I let her sit on the couch while I made
a phone call.

Q And who did you communicate with?

A I called my supervisor and told them exactly
what happened that we had maybe a possible homicide.

Q Now Patrolman Drexel, do you recall what the
defendant was wearing when you saw her at the elevator?

A To the best of my knowledge, she was wearing
a grey jumpsuit, a one piece jumpsuit and a fur coat.
I don't know what kind of fur coat, it was like a
shabby fur coat or something like that.

Q Now, after you say you took her into apartment
15B, you made telephone calls, is that correct?

A Yes.

Q And what did you do after that?

A I stayed there and I just detained her and I told her that we would have to ask questions do to the fact that she was the wife of the man who was lying on the floor. And I waited there until my superiors came.

Q And by your superiors who came?

A Lieutenant Sardo was one and Sergeant D'Ambrosio was another and I can't remember them all. There was quite a few and I just, I told them what happened and I turned them after and then Detective Parisi came on the scene and he took charge of it.

Q And Detective Parisi took charge was that in apartment 15B?

A Yes sir.

Q And after you say that your superiors took charge, what if anything did you do?

A Well I went out to the hall and tried to keep the crowd from the body you know just making myself busy so that the body wouldn't be touched or anything like that. You know keep the crowd back and all that stuff and then I was ordered after that then. I was ordered to go down stairs to look for the murder weapon down in the back, the rear of the building in the parking lot.

Q And approximately how long from the time you arrived there, were you asked to go downstairs?

A I would say approximately 45 minutes to an hour.

Q And who did you go downstairs with, do you recall?

A Yes I went down with my partner Patrolman Weisse and let me see now, God darnit, I can't think of his name I think it was Gilfroy, Patrolman Gilfroy and Sergeant D'Ambrosio. Oh, I'm sorry, it was Sergeant D'Ambrosio, it was Lieutenant Connolly that was down there. I mean Sergeant Connolly I am all confused now.

Q And now would you tell the Court and the Jury where did you go when you went downstairs?

A We went immediately down to the rear of the parking lot and we were searching for a murder weapon, some type of a gun.

Q When you got to the rear of the apartment house what if anything did you observe?

A After about 15 minutes we observed a bag all this white stuff was scattered on top of the roof and we didn't, it was just like a bag with all these

little containers in it and there was another bag on the side that was empty. It was on the side and immediately we got on the walkie talkie and we called for the detective to come down.

Q And did a detective come down?

A Yes sir.

Q Do you recall who that was?

A Detective Stypulkowski and Sergeant D'Ambrosio responded, they gathered up all of the stuff and put it in one bag and that was the end of my assignment.

Q And what did you do, did you stay downstairs?

A Yes, we stayed down there for approximately another hour looking for some kind of a murder weapon.

Q Did you find anything downstairs?

A No sir.

MR. CHRISTIANSEN: Your Honor

I have no further questions of this witness.

THE COURT: Mr. Florence do you have any questions of this witness?

MR. FLORENCE: Yes your Honor.

CROSS EXAMINATION BY

WILLIAM J. FLORENCE, ESQ.:

Q Patrolman Drexel, had you ever testified under oath as to any of the events that you testified to here at the Grand Jury say?

A Under oath?

Q Yes.

A This is the first time.

Q Had you given any statements to the Grand Jury about any incident or incidents that occurred?

A We gave a statement yes my partner made up the statement.

Q Well, did you read the statement and sign it?

A Yes sir.

MR. FLORENCE: May I see that please.

MR. CHRISTIANSEN: Your Honor may the record indicate that I am giving Mr. Florence a police report which consists of a copy of a police report which consists of four pages.

THE COURT: All right.

MR. FLORENCE: Patrolman Drexel did you in addition to this report, did you testify before the Grand Jury?

A No sir.

Q Did you testify at any other time?

A No sir.

Q In connection with this?

A No sir.

Q Did you give any other statement other than this four page statement?

A No sir.

MR. FLORENCE: All right.

THE COURT: Mr. Florence would you like time to read the statement?

MR. FLORENCE: Yes sir.

(Jury remained in Jury box all parties remained in Court room. Mr. Florence reads statement.)

MR. FLORENCE: Patrolman Drexel, what elevator did you get out of when you got off on the 15th floor?

A I recall it number 3 because it was going southbound

there were three elevators in the building.

Q Was it furthest to the south?

A It was furthest to the north, it was northbound that is why we call it 1, 2, and 3.

Q It was furthest away from the body?

A Yes.

Q And you were in the elevator with Patrolman Weisse, is that right?

A Yes.

Q Is that how you say his name? Weisse or Weesee?

A It's Weisse.

Q And as you got out of the elevator, you say there was someone standing in front of the elevator or to the side?

A Standing directly in front of us trying to enter the elevator.

Q And what did you do. Did you rush by that person?

A No we just stood there and then we just looked to the side.

Q Did you get out of the elevator?

A Well, almost immediately we looked and

we spotted a body approximately, it must have been about 30 feet down the corridor.

Q How far out of the elevator were you when you spotted the body?

A Say a step, a step and a half.

Q And then you went where, you stayed right at the scene and Weisse went down toward the body?

A No sir, as we were getting off the elevator, somebody in the crowd yelled. Grab that woman, that was in front of us, she went to our left and she placed a box down about approximately three feet from the elevator.

Q Did you see her bend over and put down a box?

A Yes sir.

Q You remember that clearly?

A Yes sir.

Q What hand was it in?

A I don't remember the hand sir.

Q And then there came a time when you took her into the apartment, apartment 15B?

A Yes sir.

Q Well, how did you get into apartment

15B?

A The apartment door was opened, almost every apartment on that floor was opened?

Q They were all opened?

A Right and her apartment was locked, well I mean I say every. Just about everybody was out in the corridor and her apartment was locked and seeing that she was hysterical and then somebody also yelled out in the crowd, that she was pregnant and I didn't want to hurt her and I asked the people. Could I bring her in the room so she could relax.

Q She seemed hysterical you say?

A Well you know, she was struggling and everything.

Q Why was she struggling?

A Because I was grabbing her.

Q What did you do, you took her then physically, then physically took her into apartment 15B?

A Right, I explained to her, I asked her who that man is and she said that's my husband and I said. Well you will have to be detained, we will have to ask you some questions and I immediately brought her into the apartment and she sat down on

the couch.

Q You walked into the Sinkoff apartment and you put her on the couch and that the was the Sinkoff living room, is that right?

A It was in the living room yes and the couch was on the left hand side.

Q And you stayed right with her then, is that right?

A Yes.

Q And did you begin to ask her questions about things or anything at all?

A Yes I didn't ask her, I didn't ask her to much... I asked her her name and I asked her did she know who the man is and she says, that's my husband.

Q Is that all you asked her?

A And well I asked her. Did anybody come to the door, did she see anything and she stated no. And that's the end of any interrogation that I made.

Q Did you notice whether or not the apartment 15A was opened or closed?

A It was closed sir.

Q And did you notice of there were any keys

in the door in that apartment door?

A No sir, I don't remember.

Q And now how long did you remain in 15B with the Defendant Deidra?

A I would say approximately between 10 to 15 minutes.

Q all right, and then somebody else appeared on the scene?

A Yes sir, well at that time everybody was there. I was waiting for my superiors and you know the door was closed after I put her in there. I closed the door.

Q You closed the door to 15B, so nobody would look in?

A It was only me, her and the Sinkoffs who were there and I made my telephone call and I notified my commander that we do have a homicide.

Q Then you called from the Sinkoff apartment would that be a fair statement or would that be fair to say?

A Yes sir.

Q And Mr. and Mrs. Sinkoff stayed where?

A Right in the living room with her. In fact

Mrs. Sinkoff was soothing her, trying to calm her down.

Q Comforting her in some way?

A Yes sir.

Q Did she bring her a glass of water?

A That I don't remember sir.

Q She was just saying soothing things to her?

A Yes.

Q And she remained there for about how long with Deidra would you say?

A I would say approximately between 10 to 15 minutes.

Q And Mr. Sinkoff, what did he do during that time?

A Well, he was just, he was just standing around, he was being more or less the same way, sympathetic. He was more or less shocked or in shock. He didn't realize what was happening.

Q Could you tell me what sort of attire he had on, if you recall?

A No sir.

Q Well just generally?

A I wouldn't remember.

Q Do you have any idea at all?

A No sir.

Q Well, how about Mrs. Sinkoff, would you recall her attire?

A No sir.

Q But you remember Deidra's attire, is that correct?

A Yes sir, she was the one in question.

Q Had you had a chance to talk about this matter with members of the District Attorney's staff and other officers of the Yonkers Police Department?

A I'm sorry I didn't hear you.

Q Have you had a chance to discuss this matter with members of the District Attorney's staff and members of the Yonkers Police Department?

A Yes sir.

Q And would you say several times that happened?

A Let me see now. I have only been up here once, only one time prior to this.

Q How about down in Yonkers. Did you talk about it down there?

A No sir, outside of our initial report that was the end of it.

Q You went downstairs and you said you found two bags, did I understand that to be your testimony?

A Yes, there was, excuse me there was two bags on the roof.

Q On the roof?

A On the roof of an automobile, one was there and it was all split open. There was another bag there, but that was empty, but the other stuff was like scattered along the roof.

Q It was on the roof of the car?

A Yes sir.

Q What kind of a car was it if you remember?

A I don't remember, I did take the license plate number and everything, but I don't recall right now.

Q Was it a light car or a dark car?

A I really don't remember, I do have it in my report though.

Q Did it have a hard top, or was the top the same as the sides?

A I couldn't, I couldn't honestly say. I really don't remember, it was very dark out there.

Q How far away from the building was this car?

A Oh, I would say, let me see, at least (indicating). I would say approximately 20 to 25 feet.

Q And you say it was very dark?

A Well, it's not really lighted up, its got lights, but its not really adequate.

Q Could you, was it that it was so dark that you couldn't see this car to tell us the color of it or that you don't recall?

A I do not recall sir.

Q You would be able to preceive a light or dark car, but you don't have a recollection of which it was?

A I don't know whether it was light or dark, I did get the license plate number though.

Q The question I meant was. Was there enough light, if you had an inclination to remember you could have seen it?

A I guess I could have sir, yes, but I probably have it in my report, in my book.

Q Did you say you have it in a book report of this as well?

A I made a notation of the license plate.

Q Where is that book now?

A Oh God, I really don't know, we go through so many books.

Q You made notes other than these notes, is that correct?

A Yes, just jotting things down sometime we just jot down on a piece of paper and then we make an initial report.

Q Do you know what you did with that report?

A No sir.

Q You didn't bring it with you?

A No sir.

Q Now, there came a time when you returned to the headquarters, isn't that correct sir? You ultimately came back down to headquarters or to the Grassy Sprain Police Station I don't know whether you call it headquarters or police station?

A No sir I do not.

Q You never went down there?

A No sir.

Q Didn't you give a statement about seven or eight o'clock in the morning as to what events occurred at this police station?

A Yes, but I didn't go immediately back, this

was after our tour.

Q After your tour?

A Oh, after our tour yes. We went back to our command and that's where we make out our report or make our report out.

Q And it was at Grassy Sprain Road?

A Yes, Grassy Sprain Road.

Q Grassy Sprain Road Police Station or Detective Station?

A It is used or it used to be the first precinct, now its something else.

Q All right, on January 24th after your tour of duty, you went back to this station, isn't that correct?

A Yes sir.

Q And you remember the police officers all around the area and the defendant Deidra being there too?

A I don't recall it.

Q Let me see if I can refresh your recollection a little bit?

A Yes.

Q Officer, Detective Parisi was there, police woman Del Blassi was there and was it Gerber was there and you went back and you were going to make your report as to what your recollection of event were, do you remember that?

A Well, that could be yes sir, but I don't remember.

Q And do you remember being asked this question and giving this answer.

(MR. FLORENCE: Reading from previous testimony.)

Q. Did the defendant have that box in her hand? and your answer was no.

MR. CHRISTIANSEN: Objection Your Honor what are we talking about here.

THE COURT: I will sustain the objection you want to get a time and place please Mr. Florence?

MR. FLORENCE: Yes the reference was when you came out of the elevator they were trying to ascertain if anybody had that box and you were asked this question.

MR. CHRISTIANSEN: Your Honor asked this question at what kind of a proceeding, where and what are we talking about and I think Mr. Florence is playing a cat and mouse game here.

THE COURT: No comment please, I want it clear where was this question asked.

MR. FLORENCE: I said at the Grassy Sprain Police Station after his tour of duty and whose presence. Now do you remember this question being asked to you.

Q. Did you see the defendant Deidra with the box and your answer was no. Patrolman Drexel, do you remember having that question asked to you and giving that answer in the presence of these people I just mentioned as well as in the presence of the defendant?

A When was that sir?

Q This was after your tour of duty, this was in the presence of the defendant at the Grassy

Sprain Police Station at approximately 8:00 a.m.
on the 24th of January 1971.

A I don't recall that sir.

Q Do you remember going back to the station?

A Yes, we always have to report back to the
station.

Q And do you remember giving your report orally
and discussing further the incident itself of that
evening or the incidents itself of that evening?

A I wouldn't say we gave it orally, nobody
asked us any questions, we just went in and we made
our report out. That is exactly what it was.

Q Do you have a recollection of not giving
any statement like that?

MR. CHRISTIANSEN: Objection.

THE COURT: I overrule it.

THE WITNESS: I don't remember
there were some people might have asked
me questions, but I didn't give like a
complete statement to anyone, except what
we put on paper.

Q I am not saying that you gave a complete

statement patrolman. I am saying, do you remember that question and giving that answer?

A I don't remember and I don't remember.
I don't think I gave an answer like that.

Q Now, did I understand that you were downstairs with Sergeant Connally was that it?

A Sergeant Connally, yes sir.

Q Who was with you?

A Sergeant Connally, my partner patrolman Weisse and patrolman Gilfoil.

Q All right, and that was the extent of the members who were with you?

A Yes, yes that was the extent of the members.

Q And what were you doing there?

A We were ordered down there to look for a murder weapon of anytype.

Q And do you recall who gave you that order?

A I believe it was Sergeant D'Ambrosio.

Q So the four of you, you, Weisse, Connally, and Gilfoil were downstairs?

A Yes sir.

Q And what happened when I say downstairs.
I mean down and outside do you understand me?

A Yes.

Q And where did you go?

A We went to the rear of the building where there is a parking lot and between the building there is a big fence and cars are parked along side of the fence. We all split up and we were looking through the bushes and underneath the cars and whatever, looking for like I said. Some kind of gun or rifle.

Q You looked under the particular car you said you saw these bags on?

A Yes sir.

Q What did you see under there?

A Nothing sir.

Q I said what did you see under there?

A Underneath this car?

Q Yes.

A I said I seen nothing.

Q There is nothing at all?

A No sir.

Q Was any of this material that you talked about being in the proximity of the bag, being under the car?

A I don't recall all I remember is on top of

the roof.

Q Did you look for any of the material under the car?

A No sir.

Q And you didn't see any?

A No sir.

Q And did you have a flashlight that night?

A I always carry one.

Q Were you using it?

A Yes sir.

Q Could you describe what you found?

A Well we found a brown bag split and these packages wrapped up with elastic bands, five or six to a thing maybe, two by two and they were on the roof of the car and there was a lot of white stuff on the car and there was another empty bag further down.

Q When you say further down on the car itself or off the car?

A No on the car itself, it was down like you know, it was empty and we didn't touch the bag or anything like that. I made my statement before that we had our walkie talkie with us and we requested the detectives to come down.

Q Did each of you have a walkie talkie or did you or Connally or who had it?

A Only the Sergeant had a walkie talkie.

Q And who would that have been?

A Sergeant Connally.

Q And Connally did what?

A He called up to the 15th floor and he requested the detectives to come down to the parking lot.

Q And did somebody come down?

A Yes sir.

Q And what happened then?

A Patrolman Stypulkowski came down and I believe it was Sergeant I think he is a Sergeant now, or a Chief now. Sergeant Sardo, and we showed them the bags and gathered up this stuff and put it in one bag and they took charge of the bags and that was the last time I seen them.

Q Which way was that car facing toward the building or which way?

A Towards the fence.

Q And the fence was between the automobile and the building?

A Yes, the building was to one side. Here

is the fence (indicating) and here is the building and the cars are parked this way.

Q Would it be a fair comment to say that the car was facing the building. The front of the car was closest to the building?

A Yes, to the best of my recollection it was it was right near the fence.

Q How many apartments are in the back of that building to your best judgement?

A Oh my God, let me see, there are 7 floors, there must be about 15 on it. Seven let me see, 15, 16, 17 stories. God knows how many building apartments. I can't really put them. I really don't know. I would say at least say approximately 70 families from the top, from the bottom to the top, anyways just on the side of the building.

Q How close to the edge of the building was this material located. Now when I say edge of the building now I am not talking about the back wall, but either of the corners that you would use?

A Well to the best of my knowledge it was directly underneath the 15th floor where Mr. Smith lived.

Q And now can you tell me how far that was from the corner of the building?

A From the corner of the building?

Q On the outside?

A Well, I would say it was almost approximately in the middle of the building and now I don't know how big the building is.

Q What I am asking you is. Can you tell me, you have to walk around this building do you not. You didn't walk out that door?

A You have to go around the back.

Q In order to get out you walked out the front door and you went around the side of one building, isn't that correct?

A Yes.

Q And when you got around to the side, you must have come to the corner between the side and the back. Now how much further from that corner was this material that you referred to?

MR. CHRISTIANSEN: Your Honor

I think that question has been asked and answered, he said it was in the middle.

THE COURT: I will let him answer the question.

THE WITNESS: Well I didn't have a tape with me.

Q I would just like you please just answer my question with your best judgement?

A My best judgement, I would say approximately maybe 100 to 150 feet from the edge of the building to where the car was. That is to the best of my knowledge.

Q What kind of a night was it weather wise to your knowledge?

A It was clear and little cold.

Q Remember what you had on. Do you remember what you had on, did you have on a uniform or you had a uniform on did you not on that night?

A Yes sir.

Q Now, when you were in apartment 15B, the Sinkoff apartment. Did you remove the defendant Deidra to apartment 15A?

A Oh no sir, not me personally, no.

Q Did you, were you with her when she physically went from 15B to 15A?

A Yes with my superiors.

Q Who was your superior or went with you?

A Well its a tough question. I know Sergeant Sardo was there, that was one. Sergeant D'Ambrosio was there, that was two. And that is to the best of my knowledge and I told them that she lived in 15A.

Q Did you determine that when you talked to her when she was in 15B?

A Yes.

Q And do you know if it was Sergeant or Mr. Sardo or Mr. D'Ambrosio who took her from 15B over to 15A?

A I don't know which one sir. It was one of my superiors that took her.

Q Was it one of the uniformed superiors who did it?

A Yes.

Q So did you follow behind or did you go in front as you left 15B?

A I just followed, just followed, she went into her apartment on her own.

Q And do you know, was there a uniformed officer in front of her as she left 15B?

A Well it's possible or possibly it was me, but I don't really remember if I was to the side of her or to the front of her or where.

Q So you left and did you go into 15B with her when she initially went in there?

A Yes, I went to 15A for approximately maybe 2 or 3 minutes.

Q All right and then what happened?

A Then I was ordered down like I said, I was ordered down to the rear of the apartment.

Q And now, during the 2 or 3 minutes did other officers come to the apartment or to apartment 15A beside yourself and one of the other uniform police officers?

A Yes, there was a few I remember Detective Parisi was there.

Q Did he come in after you?

A No, he came in along with us. He was in Apartment 15B with me.

Q All right, so he came along with you?

A He came along and then there was a few more detectives and I don't know, it could have been a chief or anybody. I wasn't really paying to much

attention.

Q Was it at somebody else's order that the defendant went from 15B to 15A?

A Yes sir.

Q Can you recall to your best recollection who that would have been?

A I would have to go back to Sergeant D'Ambrosio or Sergeant Sardo, that is the only two I can really remember.

Q And can you give me some idea of the substance of how that message got across?

A When they came I told them the situation and I told them she lives in Apartment 15A and they said okay will take her into 15A and that was the end of it.

Q To the best of your recollection at least. The substance of the conversation was. Okay we will take her over to 15A.

A That's right.

Q And do you recall whether or not, do you recall whether or not (I withdraw that.) Can you tell me your best recollection of who entered 15A with yourself and Deidra?

DREXEL - CROSS - FLORENCE

361 *

A Well I am only talking or taking a guess. Like I said, I had Sergeant two Sergeants there and Parisi was one and there was another detective and there was a couple of other plain clothes men, but I don't recall.

Q Now, did you do any looking around or any investigating in connection with this homicide?

A No sir, I just stood, I just stayed with Mrs. Smith.

Q Were there others there in there looking around?

A Yes sir.

Q Can you tell me when you over a period of say the first ten minutes if that will help you. Tell me how many people were in and out of that apartment?

A Well, I wasn't there that long sir. Like I said I was only there a couple of minutes and then after a couple of minutes other men came in, uniformed plain clothes men and they were in the apartment opening the drawers and stuff like that, going in the closets like looking for the murder weapon. That is all I can do or remember.

DREXEL - CROSS - FLORENCE 362*

Q Let me take you back to that part of your testimony when you were in there for about two minutes.

A Two to three minutes.

Q And during that period of time, how many people came in?

A Oh maybe eight.

Q All right, that was a combination of civilian clothing and uniformed officers?

A That's right.

Q All men at least that you recognized to be officers of the Yonkers Police Department, is that right?

A Yes all officers, right.

Q And these same people or as you best recall began then searching the area, is that right?

A Right.

Q And they were looking in drawers or in closets or whatever?

A They opened a few closets and were looking in the bedroom you know. I didn't observe, I know they were going through the rooms though.

Q They were looking all over the place?

DREXEL - CROSS - FLORENCE

363*

A Right.

Q Was there any conversation with the defendant while all these people were looking all around this apartment?

A I think Detective Parisi was and Detective Stypulkowski were questioning her, but after that I had no communication with her at all.

Q Once you got in the apartment, would it be fair to say you didn't have any further conversation with the defendant?

A Yes sir.

Q All right, and did you hear any conversation between the defendant and any of the other officers of the Yonkers Police Department?

A No sir.

Q do you have any recollection if any of the men while you were present in the apartment coming back with any evidence or any articles that they said that they brought your attention to?

A No sir.

Q And now all of this happened in the two or three minutes that you were there. Now where was the defendant Deidra at the time?

DREXEL - CROSS - FLORENCE

364 *

A She was sitting down.

Q In what room was she sitting?

A Let me see now. The bedroom I think it was the living room. That's right the living room.

Q And was there a couch there that she was sitting on?

A I believe there was a couch and I know she was sitting down.

Q In any event, there was a lot of activity around her?

A Yes sir.

Q And now when you went outside the apartment. What did you do? You stayed in the hallway did you not?

A Yes sir.

Q What did you notice about the hallway. Did you see anything in the hallway at all?

A Well to my observation like I say. There was quite a few people in this thing there and there was a body lying down there.

Q Where was the body?

A I would say about thirty feet from the elevator, maybe forty feet. It was a pretty long

DREXEL - CROSS - FLORENCE

365*

corridor, almost toward the end, say the last two apartments on the left side and it was lying face down.

Q And did you notice anything around the body itself?

A Well, there was, there was a weapon there.

Q Did you notice what kind of a weapon that was?

A No, I didn't, I didn't have nothing to do with the weapon at all.

Q Was there anything beside that weapon when you say weapon or when I say weapon, I mean a pistol?

A I think it was an automatic, I am not to sure, it was lying on the side of his body.

Q Near one end of the body or the other?

A Yes, I believe he was facing down and on the left side.

Q Was the arm and the hand near it?

A No, it was like sort of in the middle when I first seen it.

DREXEL - CROSS - FLORENCE

366 *

Q Was there anything else on the floor that you observed?

A Yes, we observed 5 spent shells, empty shells which was marked by the Detective with chalk.

Q When was that chalk marking done?

A I really don't know, the detectives like I say, they took charge. That is, they were in charge but we noticed the five spent bullets all the way down the corridor.

Q And now, there came a time when as I remember your testimony and I don't mean to characterize. You said you were calming the crowd?

A Yes sir.

Q You busied yourself with trying to maintain some order there?

A Some kind of order, some kind or order, they wouldn't disturb the evidence or anything else. That is what I was concerned with.

Q And that consisted of what. What I mean, what did you specifically do when you went out to the corridor?

A Just keeping the people back, everybody you know they wanted to see and I asked them to

stand aside and stay in there apartments and don't touch anything on the floor and everything and we now, we blocked off the body so people wouldn't go there.

Q Was anyone else with you doing that?

A There was several other patrolman, but I couldn't remember them.

Q All right, now did you look or is there anyother means of egress or ingress to that floor besides that elevator. You can get off and on that floor or can you get off and on that floor besides, something besides that elevator?

A Yes there is a stairwell.

Q Well where was that?

A That was in between the second and third elevator on the east side of the building.

Q On the opposite side of the wall?

A Yes.

Q Did you look in there and investigate to see if there was anything around?

A No sir.

Q Did you look around the hallway for anything that might be the weapon?

A No sir, because other patrolmen were doing that. You know I mean everyone couldn't be going in one spot at one time.

Q How long did you remain at 1841 Central Park Avenue that evening?

A I would say close to between 2 1/2 to 3 hours.

Q Do you remember after you found this substance on the top of the car. That somebody came down and got it you say?

A Yes sir.

Q Then what happened, did you stay down or did you go back upstairs?

A No, we stayed down. We were ordered still to search for a murder weapon.

Q How did you do that?

A We were looking with floodlights along the fencing looking under the cars in the bushes you know the best we could do. And then we were ordered just before say it was approximately 4:30 and the sergeant came down and said. We will call the search off until it becomes daylight and we will be able to see a little better.

Q Did you go back at daylight?

A No sir, somebody else went back after that because by that time I probably had a couple of more jobs and so I was a little bit busy.

Q How many of you stayed down searching for this weapon?

A Still the three of us, the Sergeant left.

Q Sergeant Connally left?

A Yes and it was still me and patrolman Weisse and patrolman Gilfoil. The three of us stayed down there.

MR. FLORENCE: May I have one moment Your Honor?

THE COURT: Certainly.

MR. FLORENCE: Let me direct your attention if I may just for one moment sir and for one further line of questions.

THE WITNESS: Yes sir.

Q On January 24th, 1971, do you recall receiving a telephone call, having been off duty to come back to the Grassy Sprain Police Station and go into a room in the upstairs of the building in the presence of Mr. Christiansen and the defendant Deidra and a police woman

whose name I do not know and another police woman by the name of Del Blassi. And another police officer by the name of Gebber. Do you remember that sir?

A Yes sir.

Q And do you remember one of the members, not the defendant asking the question that I asked you before. Did you see the defendant with that box and giving the answer no?

MR. CHRISTIANSEN: Your Honor

I again object this is repetitive he has gone over it three times.

THE COURT: I overrule the objection.

THE WITNESS: I don't remember saying it like that because I did see her with the box.

MR. FLORENCE: I haven't any further questions.

MR. CHRISTIANSEN: No further questions Your Honor.

THE COURT: Ladies and Gentlemen of the jury, we have been sitting now for

DREXEL - CROSS - FLORENCE

371

over a half an hour and I will now have a short recess. Then of course you will have to recess for the famous luncheon period, but I think you are entitled to a recess. We will now have a short recess.

TIME: 11:55 RECESS

TIME: 12:10 AFTER RECESS

MR. CHRISTIANSEN: May I proceed
Your Honor.

THE COURT: Please.

MR. CHRISTIANSEN: Your Honor
the People at this time call Patrolman
John DiSciorio.

THE COURT CLERK: You do
solemnly swear in the presence of the ever
living God, that the testimony that you
are about to give in this action between
the People of the State of New York and
the Defendant at the Bar, will be the truth
and nothing but the truth so help you God.

THE WITNESS: I do.

APPENDIX E

Affidavit of Petitioner Made Before
Trial in Support of Her Motion to
Dismiss and Suppress

COUNTY COURT : COUNTY OF WESTCHESTER

-----x

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs

-against-

DEIDRA SMITH a/k/a Eversley,

Defendant

-----x

STATE OF NEW YORK)

:ss.:

COUNTY OF WESTCHESTER)

DEIDRA SMITH, being duly sworn, deposes and says:

I reside at 2334 Tiebout Avenue, Yonkers, New York.

I make this affidavit in support of a motion to receive certain statements and the results of certain polygraph tests and to suppress certain evidence.

Upon information and belief, a homicide occurred at 1841 Central Park Avenue, Yonkers, New York, at approximately 1:45 A.M. on January 24, 1971. The victim was the man with whom I was living. His body was found in the hallway of the fifteenth floor of the Central Park Avenue address, approximately 30 feet from the doorway into the apartment which we shared on that floor.

I am advised the homicide occurred as the result of several gunshots fired into the victim and which were apparently either heard or witnessed by tenants on the same floor.

When the police arrived I was in the hallway. They questioned witnesses and they questioned me. The first police to arrive were two uniformed men and it was they who began the interrogation and it was they who took me to the apartment of Mr. and Mrs. Sinkov.

I was not searched nor were any of the persons in the area, to my knowledge.

I was finally permitted to leave the apartment where I was being interrogated. I went into my own apartment to call Bobby Madden's mother to tell her that he was dead. The police followed me there, they simply walked in and continued asking me questions about the homicide. Later other policemen arrived and alternately others asked me questions in relation to the homicide. This interrogation occurred while I was seated in the living room which is the room which one enters the apartment from the hallway where the homicide had occurred. I did not invite the police into my apartment and in point of fact when I questioned the police officer what he was doing in the apartment he said that he had a right to be there because there had been a murder in the hallway.

I remained in my apartment from approximately 2:15 or shortly thereafter until approximately 4:00 A. M. under constant surveillance of different police officers who continued to question and interrogate me in relation to the homicide. At no time during that period was I searched and at no time during the period was my apartment searched.

Subsequently I was informed by the police that I was going to be taken to the "station house" for further interrogation. At about 3:30 a.m. the police began searching the entire apartment. I was required to sit on the couch in the living room. Although I was not permitted, I made a phone call to my girlfriend who came to the residence. Another detective came into the premises cursing, turned the couch upside down and made a shambles of the room. At no time during the entire period did I authorize nor invite the police into my apartment nor did I at any time consent to any search of myself or the premises nor did the police show me any warrant or authorization to make such search. Nor did the questioning at any time deal with any of the matters with which I am at present charged as crimes.

After my removal to the station house, interrogation continued until 1:00 P.M. of that day. During that period of time there were intervals of my being sick to my stomach. By this time not only was I emotionally numb upon the realization that Bobby Madden was dead, I was also aware that I was carrying his baby and was three (3) months pregnant and was aware that the baby would not have a father now, and it was further apparent to me that the police believed that I had caused Bobby's death or knew something that I had not told them, although in point of fact, I had absolutely no idea who killed Bobby Madden nor did I know why. After eleven (11) consecutive hours of interrogation, I was remanded to the County Jail as a witness to the homicide. I have no idea what I said in answer to the questions that the police propounded to me.

I was not advised at any time of my right to remain silent, of my right to contact an attorney, and if I could not afford one, to have one appointed on my behalf, or any other of the constitutional protections. In point of fact, I was not allowed out of the jail until I agreed to take a polygraph or a "lie detector" test. And, it was after I took the lie detector test and the results were interpreted by the police that bail was set and raised by members of my family and I was ultimately released from jail.

Although I am not sure, I believe that I have signed certain statements prepared by the police during the interrogation and I further believe that I signed certain statements again prepared by the District Attorney's office or members of the police force when I was in jail awaiting the setting of bail. The statements I signed and the polygraph test, I was advised, were necessary in order for me to ever be released from jail. This conversation occurred at the jail house between me and a person whose name I do not recall representing either the District Attorney's office of the Police Department of the City of Yonkers.

WHEREFORE, I respectfully request the Court to suppress such evidence as was illegally obtained and to suppress such further evidence as was taken from me against the constitutional guarantees provided

for my protection and for such other and further relief as to the Court shall seem just and proper.

Sworn to before me this

Deidra Smith
Deidra Smith

26th day of April, 1972

Barbara Buchmaier

BARBARA BUCHMAIER
Notary Public, State of New York
No. 40-5505065
Qualified in Putnam County
Cert. filed in Westchester County
Commission expires March 30, 1976

APPENDIX F

Docket Entries in Petitioner's Case
in the County Court, County of West-
chester

95/141

FRIDAY, JANUARY 29, 1971

Court met pursuant to adjournment 10:15 a.m. Judge arrived at Chambers 9:30 a.m.
Proclamation made and court opened

PRESENT: HON. FRED A. DICKINSON, COUNTY JUDGE OF PUTNAM COUNTY ACTING IN AND
FOR WESTCHESTER COUNTY

Court Stenographer Michael McDonough
Deputy County Clerk Thomasina D. Cooke

Application for Bail before Grand Jury Action

2:20 p.m.

Deidra Smith
a/k/a Deidra Eversley

242/71

Alfred Christiansen, ADA
Mr. Charles Wallace
atty for deft.

The defendant is not present. Mr. Wallace makes his application for bail

BAIL FIXED IN THE AMOUNT OF \$10,000.00

3:30 p.m. Court stands in recess.

MONDAY, FEBRUARY 1, 1971

At a Trial Term of the County Court Part III
held in and for the County of Westchester
at the Court House, in the City of White Plains, NY
on the 1st day of February, 1971

Court convened at 9:15 a.m.

PRESENT: HON. GEORGE BEISHEIM, JR., COUNTY JUDGE PART III

Deputy County Clerk Roberta Fishman

Stenographer Brenda Cohn

Proclamation made and Court opened

The People)

vs) Material Witness

Deidra Smith)

A. Christiansen, ADA
C. Wallace

The Assistant District Attorney makes application pursuant to Sec. 618 B of the
C.C.P. to hold Deidra Smith as a material witness and bail be fixed in the sum
of \$1000,000.00. Court sets bail in the sum of \$100,000.00.

Defendant remanded.

TUESDAY, MARCH 16, 1971

Court met pursuant to adjournment

PRESENT: HON. GEORGE D. BURCHELL, COUNTY JUDGE, PART II

Proclamation made and Court opened at 9:30 a.m.

Deputy County Clerk: Jack Rubenfeld

Stenographers: Stephen Sacripanti and Pat McKay

Mr. Louis A. Solomon, Acting Foreman of the March Grand Jury "A" Panel, came into court and handed up the following as his Partial Report and then continued on to do his work:

L. Eckstein ADA

Deidra Smith, a/k/a
Deidra Eversley

Indict.#242/71 Crim.Poss.Dang.Drug 1° (2)

MONDAY, NOVEMBER 1, 1971

At a trial term of the County Court held in and for the County of Westchester in the Court House in the City of White Plains, NY on the 1st day of November, 1971

Court met pursuant to adjournment

PRESENT: HON HAROLD L. WOOD, COUNTY COURT, PART II

Proclamation made and Court opened

Deputy Court Clerk Jack Rubenfield

Stenographer Susan McNamara

The People) 2 cts:

Crim.Poss.Dang.Drug 1° (2)

Indict.#242/71

vs)

Deidra Smith)

a/k/a)

Eversley)

J.W.RAKACKY, SADA
C. WALLACE

Marked ready at request of Counsel.

THURSDAY, APRIL 7, 1972

Court convened at 9:30 a.m.

PRESENT: HON. GEORGE D. BURCHELL, COUNTY COURT PART III

Deputy County Clerk R. Fishman

Stenographer B. Cohn

Proclamation made and Court opened

The People) Indict.#242/71

O. Bellantoni, ADA

W.J. Florence

vs)

Deidra Smith)

Defendant not present in Court. Mr. William J. Florence retained by the
defendant. Thirty days for motions. Matter adjourned to 4/14/72.

FRIDAY, APRIL 14, 1972

Court convened at 9:30 a.m.

PRESENT: HON. GEORGE D. BURCHELL, COUNTY COURT PART III

Deputy County Clerk R. Fishman

Stenographer B. Cohn

Proclamation made and Court opened

The People) Indict.#242/71

A. Christenson

vs)

Wm. Florence

Deidra Smith)

Defendant present in Chambers with her counsel. Deidra Smith confirms her
consent to have Mr. Florence acting as an attorney in her defense.

Defendant continued on bail.

FRIDAY, MAY 26, 1972

Court Convened at 9:30 a.m.

PRESENT: HON. GEORGE D. BURCHELL, COUNTY COURT PART III

Deputy County Clerk R. Fishman

Stenographer R. Impallomeni

Proclamation made and Court opened

Deidra Smith Indict.#242/71 Motion to dismiss Indict. Fully submitted.

THURSDAY, SEPTEMBER 7, 1972

Court convened at 9:30 a.m.

PRESENT: HON. TIMOTHY J. SULLIVAN, COUNTY COURT, PART III

Deputy County Clerk R. Fishman

Stenographer H. Abel

Proclamation made and Court opened

Deidra Smith Indict.#242/71 Adj. 9/11/72 9:30 a.m. Deft to be present.

MONDAY, SEPTEMBER 11, 1972

Court Convened at 9:30 a.m.

PRESENT: HON. TIMOTHY J. SULLIVAN, COUNTY COURT, PART III

Deputy County Clerk R. Fishman

Stenographer S. McNamara

Proclamation made and Court opened

Deidra Smith Indict.#242/71 Deft present and ready for trial
W. Florence Atty.

MONDAY, DECEMBER 11, 1972

Court met pursuant to recess at 9:30 a.m.

Proclamation made and Court opened

PRESENT: HON. TIMOTHY J. SULLIVAN

Court Clerk Carol Deery

Official Reporter B. Cohn.

Deidra Smith Indict.#242/71 Ready Subject:

DECEMBER 12, 1972

Court met pursuant to recess

Proclamation made and Court opened

PRESENT: HON. TIMOTHY J. SULLIVAN

Court Clerk Carol Deery

Official Reporter: B. Cohn

CALENDAR CALL MADE AND CASES DISPOSED OF AS FOLLOWS:

Deidra Smith Indict.@242/71 R.S. Ref. to Judge Wood

THURSDAY, DECEMBER 14, 1972

Court met pursuant to recess

Proclamation made and Court opened

PRESENT: HON. TIMOTHY J. SULLIVAN

Court Clerk Carol Deery

Official Reporter: B. Cohn

CALENDAR CALL MADE AND CASES DISPOSED OF AS FOLLOWS:

Deidra Smith Indict.#242/71 Ref. to Judge Wood

MONDAY, DECEMBER 18, 1972

Deidra Smith Indict.#242/71 Assigned to J. Couzens for trial.

WEDNESDAY, JANUARY 3, 1972

Court convened pursuant to adjournment
Proclamation made and Court opened
PRESENT: HON. JOHN C. COUZENS, COUNTY JUDGE
Deputy County Clerk Thomasina D. Cooke
Court Stenographer Rose Impallomeni

The People)	Indict.#242/71	AL CHRISTENSEN, ADA
vs)	HEARING "CHALLENGE TO THE ARRAY"	WM. FLORENCE
Deidra Smith))		

The defendant is present with her attorney. The A.D.A. is present.

COMMISSIONER OF JURORS, RICHARD N. LANDER is sworn by the Clerk. He is questioned by the attorneys as to procedure.

Mr. Florence requests certain statistic figures. Decision reserved.

Hearing adjourned to Jan. 4, 1973 at 10:00 a.m.

THURSDAY, JANUARY 4, 1973

Court convened pursuant to adjournment
PRESENT? HON. JOHN C. COUZENS, COUNTY JUDGE
Deputy County Clerk Thomasina D. Cooke
Court Stenographer Rose Impallomeni
Proclamation made and Court opened

The People)	Indict.#342/71	AL CHRISTENSON, ADA
vs)		WM. FLORENCE, ATTY
Deidra Smith))		

11:55 am The defendant is present with her attorney. The ADA is present.

The Court having reserved as to the defendant motion now advised the defendant her motion is denied.

Mr. Florence moves for a mis-trial and /or an adjournment and gives his reasons. Motion denied. Exception.

12:08 The Court declares a recess.

12:21 p.m. Court convenes. The defendant is present with her attorney.

The ADA is present. The prospective jury is present.

The Court excuses the prospective jury until 2:00 pm.

2:00 pm Afternoon session: The defendant is present with her attorney.

The ADA is present. The prospective jury panel is present.

The People move the indictment to trial.

The defendant is ready and the clerk advises her that if she wishes to challenge an individual juror she must do so before they are sworn.

APPENDIX G

Indictment No. 242-71, County
of Westchester, People of the
State of New York against Deidra Smith

COUNTY COURT : WESTCHESTER COUNTY

..... x

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DEIDRA SMITH, Also Known As
DIEDRA EVERSLEY,

Defendant.

..... x

THE GRAND JURY OF THE COUNTY OF WESTCHESTER,

by this Indictment, accuse the defendant of the crime of
CRIMINALLY POSSESSING A DANGEROUS DRUG IN THE FIRST DEGREE,
committed as follows:

The defendant, in the City of Yonkers, County of
Westchester and State of New York, on or about January 24,
1971, did knowingly and unlawfully possess a narcotic drug
consisting of one or more preparations, compounds, mixtures
or substances of an aggregate weight of sixteen ounces
or more containing heroin.

SECOND COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuse the defendant of the crime of CRIMINALLY POSSESSING A DANGEROUS DRUG IN THE FIRST DEGREE, committed as follows:

The said defendant, in the City of Yonkers, County of Westchester and State of New York, on or about January 24, 1971, did knowingly and unlawfully possess a narcotic drug consisting of one or more preparations, compounds, mixtures or substances of an aggregate weight of sixteen ounces or more containing cocaine.

All contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of New York.

/s/ Carl A. Vergari

District Attorney of Westchester County

APPENDIX H

Opinion of County Judge George D. Burchell,
County Court, County of Westchester, on
Motion to Suppress and Dismiss

COUNTY COURT : COUNTY OF WESTCHESTER

----- X

THE PEOPLE OF THE STATE OF NEW YORK

- against -

IND. NO. 242/71

DEIDRA SMITH, a/k/a DEIDRA EVERSLEY,

Defendant

----- X

BURCHELL, J.

95/141 ✓

The defendant's omnibus motion is disposed of
as follows:

That part of the motion to dismiss the indictment
upon the ground that the evidence before the grand jury was
not legally sufficient is denied. The moving papers fail to
set forth facts supporting defendant's allegations that the
evidence presented to the grand jury was insufficient to
sustain the indictment. (CPL. Section 210.30 (2)).

That branch of the motion which seeks to suppress
certain evidence allegedly illegally obtained is granted upon
consent of the D.A. to the extent that a hearing will be held
immediately prior to trial, unless otherwise ordered, on the

legality of the seizure of the evidence from defendant's apartment.

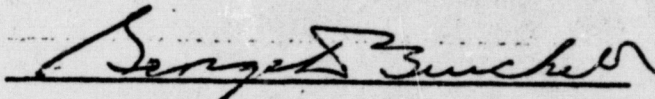
That part of the motion to suppress certain statements made by defendant is granted upon consent of the District Attorney to the extent that a hearing will be held immediately prior to trial to determine whether defendant was advised of her Miranda rights and whether she waived same.

The motion is in all other respects denied.

The aforesaid constitutes the decision and order on the motion.

The District Attorney is directed to serve a copy of this decision and order, with notice of entry, upon defendant's counsel.

Dated: White Plains, New York
June 2, 1972



GEORGE D. BURCHELL
County Court Judge

HON. CARL A. VERGARI
District Attorney of
Westchester County
County Courthouse

WILLIAM J. FLORENCE, JR., ESQ.
Northcourt Building
White Plains, N. Y. 10601

APPENDIX I

Opinion of County Judge John C. Couzens,
County Court, County of Westchester, on
Motion to Suppress and Dismiss

COUNTY COURT : COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DIEDRA SMITH, a/k/a
DIEDRA EVERSLEY,

Defendant

IND. NO.

95/141
242-71

COUZENS, J.

Pursuant to an order of this Court dated June 2, 1972, a hearing was held to determine the admissibility at trial of certain real evidence and statements of the defendant. At the conclusion of the hearing, the People withdrew their notice of intent to use a sworn recorded statement of the defendant. The Court, however, is left to determine the admissibility of certain oral statements which were testified to during the course of the hearing on the admissibility of the real evidence.

The facts, as found by this Court as established by the credible evidence produced by the People and the defendant are as follows:

On January 24, 1971, sometime after 1:00 A.M. a shooting occurred in the hallway on the fifteenth floor of the apartment house at 1841 Central Park Avenue, Yonkers, New York. Several of the tenants on the fifteenth floor, including the Sinkov's, called the Yonkers Police Department to report the incident.

Patrolmen Weisse and Drexel responded to a radio call to investigate the incident and were the first police to arrive at the scene. As they disembarked the elevator they saw the defendant crouched over a metal box to the left of the elevator. They proceeded to walk down the hall to the right toward the People surrounding the body. As they proceeded someone shouted, "Stop her, she's the wife!" Officer Drexel stopped the defendant, who had left the metal box and was running toward the stairwell, located opposite the elevator.

The defendant and Officer Drexel then walked in the direction of the body, which was in the vicinity of apartment 15-B, the Sinkov's apartment. The defendant was comforted by Mrs. Sinkov and invited into her apartment. She and the officer entered apartment 15-B. Mrs. Sinkov told her to call her mother so that she might have someone to help and comfort her. Mrs. Sinkov indicated to the officer that Diedra was several months pregnant, a fact which the defendant later verified.

Detective Parise was the first detective to arrive.

He observed several other police on the fifteenth floor, and quickly viewed the body, spent cartridges and metal box, which were in the hallway before entering the Sinkov's apartment, where he was told he might find the deceased's wife. He apologized to the defendant, but indicated that he had to ask her a few questions about the man in the hall and what had occurred. The defendant then requested that they go back to her apartment, which they did. She thereafter indicated that she wished to return to her apartment because she didn't want it known that she and the deceased were not really married, that her real name was Diedra Smith and his Bobby Madden, and that they had been using the married name Eversley. During this period of time other officers and detectives arrived at the scene, to include Deputy Police Chief, then Lieutenant Sardo, Detective Styplukowski and Sergeant D'Ambrosio.

Upon his arrival, Detective Stypulkowski was informed by a neighbor that Bobby Madden had opened the door of apartment 15-A with his key and was stepping into the apartment when he was pushed back and shot and followed down the hall by a man who fired five more shots at him before Madden collapsed in the vicinity of apartment 15-B. Later the defendant was seen removing property from Madden's pockets, and returning to the apartment, then exiting with

- the metal box, at which time she was first observed by Officers Drexe and Wiese. Detective Styplukowski was further informed
- that the defendant was now in apartment 15-A with Detective Parisi. Detective Styplukowski entered apartment 15-A and proceeded to the living room where he found the defendant and Detective Parisi. The defendant asked to go to the bathroom, which she was allowed to do. While the defendant was in the bathroom, Chief Sardo arrived and was briefed on what the investigation had uncovered to date.

- When the defendant returned, the Chief asked if she would mind if they looked around for a gun, postulating that during the confusion and while she was next door someone might have returned to the apartment. She said she had no objection. The Chief and the defendant then went into the bathroom to look around.
- He again asked if he could look around and she said yes. When he opened a vanity he found a hat box top with what appeared to be a marijuana cigarette in it. The defendant then said, "Your not going to be a chicken and bust me on this are you?" The Chief answered, "I may have to".

They returned to the living room where the defendant requested to make a telephone call to one Thelma Grant. She was allowed to make the call and after the call asked to go to the bathroom again. She went into the bedroom and then into the

• bathroom. She was told not to lock the bathroom door. She left the door slightly ajar. Thereafter, the toilet began flushing and the shower was heard running. After a period of time, one of the officers knocked on the door and Diedra was told to come out.

The defendant indicated she had taken a shower and had nothing on and asked for a robe. Detective Stypulkowski went into the bedroom and returned with a fur coat he found on the bed. The defendant then went into the bedroom to dress. While she was dressing, Chief Sardo went into the bathroom and saw a large paper bag with a white powdery residue on it. There was also a white powdery residue on the toilet, sink and tub. Detective Parisi, who had been a narcotics detective for a period of years expressed the opinion that it was heroin. While this discussion took place in the bathroom, Detective Stypulkowski knocked on the bedroom door, feeling that the defendant had had ample time in which to dress. When the bedroom door opened, the Detective noticed a cold blast of air that he had not noted when he entered earlier to obtain the fur coat. He then noticed that one of the two windows directly opposite the door was open. He walked to the window, and found a bag on the sill which contained a white powder in a cellophane bag. Detective Parisi was called and gave the opinion

that it "looked like junk". Sergeant D'Ambrosio was dispatched to search the area below the window for a gun or any other possible evidence. A quantity of narcotics was found in the parking lot directly below apartment 15-A's open window. Detective Stypulkowski joined the search party in the parking lot and returned to the apartment with that portion of the narcotics which could be recovered. A further search of the lot and nearby woods turned up no weapon. Detective Stypulkowski upon his return from the outside, went to the bathroom to examine it. In an open hamper he saw the garment, a one piece gray jump suit, that the defendant was wearing when he first arrived. He removed it and noted traces of white powder on it.

During Detective Stypulkowski's trip into the bathroom, Chief Sardo placed the defendant under arrest for possession of narcotics, and advised her of her rights. Detective Stypulkowski returned to the living room and began glancing around the apartment. The defendant observing Detective Stypulkowski's glances asked if he wanted to search the place. He said, "yes". She then said, "Be my guest, but don't tear it up".

A detailed search was begun for weapons and additional narcotics. The search turned up a scale, 20,000 - 30,000 glassine

bags and additional narcotics from a den area. While this search proceeded the defendant requested that she be allowed to go into the bedroom to put on under garments, indicating she had not done so earlier.

She was allowed to return to the bedroom to redress in the company of Chief Sardo and Thelma Grant, who had arrived. While in the bedroom Chief Sardo found another small brown paper bag with several glassine bags of narcotics on a windowsill and several more in a small kleenex box. Upon their return to the living room the metal box from the hall was brought into the living room and when opened was found to contain additional narcotics. As the defendant was about to leave the apartment for the police station she asked, "Can I go to the bathroom, I really have to go this time".

In this suppression motion, the Court is called upon to calmly piece together the events of the morning of January 24, 1972. Piece together events based upon testimony of witnesses investigating a homicide which during the evening, concomitantly became an investigation of a large scale drug operation. This Court is mindful that while it sits back discussing the legal niceties of those events it must never lose sight of the fact that the events of that evening were not calm, but rather, chaotic.

The testimony has raised consent as the basis for any and all searches made on January 24, 1972. The People have the burden of proving consent. (Bumper v. North Carolina, 391 U.S. 543 (1968), People v. Whitehurst, 25 N.Y. 2d 389). The defendant invited Detective Parisi into her apartment so that she might freely discuss the information he requested for his homicide investigation. Chief Sardo requested to look about the apartment in furtherance of that homicide investigation; at the time of these requests the defendant was not suspected of drug possession. The police were there investigating a murder and she was being cooperative in that investigation. Her consent was freely and voluntarily given. The original entry into the apartment was by invitation of the defendant. Thereafter, an examination of the apartment was begun with her consent.

The defendant's own unusual behavior attracted attention to the bathroom where heroin was initially observed by the police. Thereafter, narcotics appeared wherever the police turned in the apartment. Only those items found in the den were the product of a "search"; all other quantities were found in open view and almost in spite of police actions. Throughout the evening the police were in the apartment motivated by a homicide investigation and not until the full realization of the quantity of drugs involved did it become a drug investigation as well. The evidence

is not subject to suppression just because contraband other than that originally sought during a search was revealed. Defendant's motion to suppress the real evidence is denied.

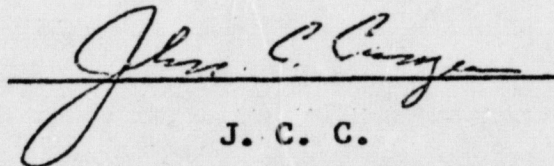
With respect to any statements of the defendant up to the time of her arrest, the defendant was not suspected of any crime. All statements made by her were made not while she was in any sense of the word "in custody". She had freedom of movement and contact with friends and neighbors. All such statements are admissible. The statement made after her arrest and after being advised of her rights was not given in response to any question, but rather was a voluntary spontaneous statement and is admissible. (People v. Torres, 21 N.Y. 2d 49). Defendant's motion to suppress these oral statements is denied.

The aforesaid constitutes the decision and order on the motion.

The County Clerk is directed to serve a copy of this decision and order with notice of entry upon defendant's counsel and the District Attorney.

Dated: White Plains, New York

Dec 29, 1972


J. C. C.

Answer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

In the Matter of the Application of :
DEIDRE SMITH, :
Petitioner, :
For a Writ of Habeas Corpus : ANSWER
-against- : 74 Civ. 4399
JANICE P. WARNE, Superintendent, : H.R.T.
Bedford Hills Correctional Facility :
of the State of New York, :
Respondent. :
-----X

JANICE P. WARNE, Superintendent of Bedford Hills
Correctional Facility, by her attorney LOUIS J. LEFKOWITZ,
Attorney General of the State of New York for her answer to the
petition alleges as follows:

1. Lack knowledge or information sufficient to form
a belief as to allegations and statements contained in the
petition except as set forth in the minutes of suppression
hearing dated December 18, 19, 21, 22 of 1971, the opinion and
order of the County Court of Westchester County (Couzens, J.)
dated December 29, 1972 denying motion to suppress statements

and real evidence, the trial transcript in two volumes, and copies of the Defendant-Appellant's Brief and the Respondent's Brief submitted to the Appellate Division, Second Department, all of which are herewith submitted.

2. Deny upon information and belief the allegations and statements contained in paragraphs "Second", "Twenty-Sixth", "Twenty-Ninth" and "Thirty-Second" of the petition.

AS AND FOR A FIRST SEPARATE AND
COMPLETE DEFENSE

3. The State court's factual determination after a hearing on the merits that petitioner consented to the entry and search of her apartment is fairly supported by the record.*

AS AND FOR A SECOND SEPARATE AND
COMPLETE DEFENSE

4. The totality of the circumstances disclosed by the record establishes that petitioner consented to the search.

AS AND FOR A THIRD SEPARATE AND
COMPLETE DEFENSE

5. The record shows that the search of the apartment was incidental to a lawful arrest.

AS AND FOR A FOURTH SEPARATE AND
COMPLETE DEFENSE

6. The record shows that petitioner's statements were not made while in custody of the police and the Miranda warnings were not required.

AS AND FOR A FIFTH SEPARATE AND
COMPLETE DEFENSE

7. The record shows that petitioner's statements were voluntary and spontaneous.

AS AND FOR A SIXTH SEPARATE AND
COMPLETE DEFENSE

8. Petitioner received a fair trial and she was not deprived of any constitutional right.

WHEREFORE, it is respectfully requested that the petition be dismissed.

Dated: New York, New York
October 31, 1974

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Superintendent Warner
By

BURTON HERMAN
Assistant Attorney General
Two World Trade Center
New York, New York 10047

* 1. Parisi's testimony that petitioner consented to go to her apartment (SH 192; Tr 475-476).

2. Parisi's testimony as to the reason for the consent namely everyone on the floor thought that she and deceased were legally married. (SH 192) See also Deidre's testimony on this (Tr 1254; 1257-1258).

3. Sardo's testimony that petitioner agreed to allow them to look around for the murder weapon S.H. 13; Tr 258.

4. Stypulkowski's tetimony that petitioner agreed to the search of the apartment as long as they don't tear it up (SH. 114) See also Parisi's testimony on this (Tr 486; SH 221).

Verified Traverse

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application
of

74 CIV. 4399

DEIDRE SMITH
for a Writ of Habeas Corpus
- against -

VERIFIED TRAVERSE TO ANSWER
AND RETURN TO ORDER TO
SHOW CAUSE

JANICE P. WARNE, Superintendent,
Bedford Hills Correctional Facility
of the State of New York,
Respondent.

DEIDRE SMITH, petitioner in this proceeding, by her attorney, FREDERICK J. LUDWIG, acting in her behalf, respectfully shows to this Court in traverse to the answer and return made by respondent, JANICE P. WARNE, by her attorney, LOUIS J. LEFKOWITZ, Attorney General of the State of New York:

FIRST. Denies, upon information and belief, each and every allegation contained in paragraphs "3", "4", "5", "6", "7", and "8".

SECOND. That, upon information and belief, the factfinding procedure employed by the State court in making its determination of material factual issues involved in the within proceeding was not adequate to afford a full and fair hearing.

THIRD. That, upon information and belief, the material facts involved in the within proceeding were not adequately developed at the State court hearing on the merits before determination of the said factual issues.

FOURTH. That the petitioner and applicant in this proceeding did not receive a full, fair, and adequate hearing in the said State court proceeding.

FIFTH. That the petitioner and applicant in this proceeding was otherwise denied due process of law in the said State court proceeding.

SIXTH. That the said factual determination by the State court is not fairly supported by that part of the record pertinent to the determination of the sufficiency of the evidence supporting said determination.

Respectfully submitted,

/s/ FREDERICK J. LUDWIG

FREDERICK J. LUDWIG
Attorney for Petitioner
60 East 42nd Street
New York, N.Y. 10017
Suite 2206

STATE OF NEW YORK)
COUNTY OF NEW YORK) Ss.:

FREDERICK J. LUDWIG, being duly sworn, deposes and says: That he is the attorney for the petitioner herein and is acting in her behalf. That he has read the foregoing traverse of the answer and return of respondent herein and knows the contents thereof. That the same is true to his own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

/s/ FREDERICK J. LUDWIG

Sworn to before me this
6th day of November, 1974

Memorandum of Former District Judge Tyler Denying
Application for Leave to Issue Writ Without Any
Hearing

Petitioner's conviction was affirmed without opinion by the Second Department of the Appellate Division of New York, sub nom, People v. Deidra Smith, 43 App. Div. 2d 1018, 351 N. Y. S. 2d 1022 (February 11, 1974). Leave to appeal to the New York Court of Appeals was denied, _____ N. Y. 2d _____ (March 6, 1974). Petitioner has thus exhausted all available state remedies.

In this court, petitioner has applied for a writ of habeas corpus, contending that her confinement is constitutionally invalid. Specifically, she argues that the Fourth Amendment was violated by her "detention" without probable cause and the warrantless search of her apartment, which search was not justified by her detention, extended beyond the room in which she was being detained, and continued after she was taken to the police station. Therefore, she argues, the evidence seized during the search should have been suppressed rather than introduced at her trial. Petitioner also claims that she was not advised of her constitutional rights during the first two and one-half hours that she was detained, yet statements made by her during that time were admitted in evidence against her, in violation of the Fifth and Sixth Amendments. Furthermore, she contends that the prosecutor's summation was so prejudicial as to deny her a fair trial and

procedural due process as guaranteed by the Fourteenth Amendment.

I. Exclusion of Real Evidence

Petitioner's Fourth, Fifth, and Sixth Amendment contentions were first dealt with by the trial judge, Judge Couzens, in a suppression hearing held December 18-22, 1972. The transcript of that hearing discloses ample evidence to support the trial judge's conclusion that petitioner had consented to the search. The event which prompted the police investigation was the fatal shooting of petitioner's lover in the hallway adjoining the apartment which they shared. The police, informed that petitioner was the victim's wife, approached her as such, seeking to comfort her and asking her questions about her husband to aid them in their investigation of the murder. The judge found that petitioner then invited the police into her apartment so that she might freely discuss matters related to the homicide. At that time, not suspected of drug possession but merely cooperating in the investigation of the homicide, she freely and voluntarily consented to the police chief's request to look around the apartment in furtherance of that investigation. It was petitioner's own unusual behavior - numerous trips to the bathroom and a prolonged change of clothes in the bedroom - that first

attracted the police to those areas, where narcotics were in plain view, and where it appeared that she had tried to destroy evidence. Finding that only the items discovered in the den were products of a "search", to which petitioner had consented, Judge Couzens denied petitioner's motion to suppress the real evidence produced in the search.

Petitioner's version of the facts is that the police had no cause either to suspect her of the murder, as two witnesses had stated that the murderer was male, or to search her apartment, as she claims the murder weapon lay beside the victim's body. Nevertheless, she argues that the police seized her, transferred her from the neighboring apartment to her own apartment without her consent, and demanded under color of office to search her apartment, so that her acquiescence was not a product of her free choice. Furthermore, she contends that the search went beyond the scope of her coerced consent.

Petitioner's version, however, is contradicted by the overwhelming weight of the testimony at both the suppression hearing and the trial. Her own testimony demonstrates her concern that the neighbors not learn of her unmarried state and that they not be brought into the matter - the reasons that she voluntarily invited the police to enter her apartment;

Trial Transcript (TT) at 1255, 1257-8, 1363-4.

The only testimony which might support petitioner's claim of coercion is the trial testimony of one Patrolman Drexel. However, that testimony was in part contradictory, ^{1/} in part inconclusive, ^{2/} and contradicted ^{3/} by the testimony of other policemen.

The reason the police gave petitioner in asking if they might search her apartment - that someone might have run into her apartment in the general confusion and there discarded the murder weapon or other evidence ^{4/} -

^{1/} For example, though stating that petitioner "went into her apartment on her own," TT at 364, Drexel then stated that she entered her apartment at someone else's order. TT at 366.

^{2/} Drexel did not testify to hearing the other policemen order petitioner into the apartment, but apparently bases his conclusion on another policeman's statement that "[we'll] take her into 15A." TT at 366.

^{3/} As to petitioner's voluntary invitation, see Suppression Hearing Transcript [SHT], at 192, TT at 475-6. As to Drexel's statement that he accompanied petitioner and other policemen into her apartment, see TT at 1254-5, 1260.

^{4/} SHT at 13, 45.

is also supported by the evidence and by their later behavior in looking for the gun. ^{5/} By petitioner's own testimony and that of one of her witnesses, the gun found near the victim's body appears to have been his own - not the murder weapon. TT at 1051, 1227-28. Moreover, one witness had told the police that she had seen a male emerge from the victim's apartment shortly after the victim and shoot him. SHT at 149-50. Given that petitioner was not suspected of any crime and that she was cooperating in the homicide investigation, her consent to the search is plausible and, moreover, is supported by the testimony of several policemen. ^{6/}

Viewing the totality of the circumstances, this court finds that petitioner consented to the search. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. DeMarco, 483 F.2d 828, 830 (2d Cir. 1973).

After the police were led by petitioner's actions to search for drugs as well as the murder weapon, their continued search was justified not only by her consent but also by the obvious threat of destruction of

^{5/} SHT at 50, 57, 163, 172, 193; TT at 339, 361.

^{6/} SHT at 13, 49, 134, 135; TT at 258.

evidence, see Schmerber v. California, 384 U.S. 757, 770 (1966), a threat which here required a search of the entire apartment, see United States v. Pino, 431 F.2d 1043, 1045 (2d Cir. 1970).

The trial judge's written findings and refusal to suppress the evidence under the Fourth and Fourteenth Amendments were amply justified by testimony at the suppression hearing. As his determination resolved the factual issues relevant to the search, that determination is entitled to a presumption of correctness. LaVallee v. Delle Rose, 410 U.S. 690, 692 (1973). Moreover, Drexel's trial testimony need not have given rise to sufficient doubt to require the judge to reconsider his earlier ruling. Contrast Rouse v. United States, 359 F.2d 1014 (D.C. Cir. 1966).

II. Exclusion of Petitioner's Statements

Petitioner contends that though the police had no grounds to suspect her, they detained her first in the neighbor's apartment, then in her own, and while holding her in their "custody" questioned her without first advising her of her constitutional rights, so that her Fifth and Sixth Amendment rights were violated by admission of these statements at trial. After the suppression hearing, however, Judge Couzens ruled that before petitioner's arrest she was suspected of any crime and not in custody, so that the statements were admissible. When enough evidence was discovered

to give the police probable cause to suspect her of possessing dangerous drugs, they arrested her and gave her Miranda warnings. Petitioner's statement after those warnings was found by Judge Couzens to be voluntary, spontaneous, and, hence, admissible.

Once again, petitioner's version is contradicted by the weight of the testimony. A disinterested neighbor as well as policemen testified that the initial interest of the police in petitioner was to comfort an aggrieved and hysterical widow ^{7/} and also to ask her questions about her husband that could aid the police in solving the murder, ^{8/} questions such as the name of the victim and whether anyone had come to the door of her apartment, TT at 346, not questions suggesting she was suspected of having committed the crime.

It thus appears that the trial court's determination that petitioner was not a suspect or in custody prior to the arrest was sound. Because she was not in custody and the questioning was not a custodial interrogation, see United States ex rel. Sanney v. Montanye, 364 F. Supp. 905,910 (W. D. N. Y. 1973), aff'd, 500 F.2d 411 (1974), Miranda warnings were not necessary,

^{7/}
SHT at 44, 52, 223; TT at 345, 708.

^{8/}
SHT at 191-92, 214; TT at 338, 346.

Miranda v. Arizona, 384 U.S. 436, 477-78 (1966). There is testimony that petitioner was advised of her rights at the time she was arrested, SHT at 19. Accordingly, petitioner's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments were not violated by the admission of her statements.

III. The Prosecutor's Summation

Petitioner claims that she was deprived of a fair trial in violation of her Fourteenth Amendment rights to due process by the "double hearsay" testimony of the prosecutor in his summation. Specifically, petitioner objects to the prosecutor's reference to a lie detector test which petitioner had taken and of which the prosecutor had been informed when he was investigating this case:

"... Deidre was not asked any questions to my knowledge. I wasn't there, but I talked to him the man the state trooper who did it and he said he did not ask any questions about drugs and that is all I will say your Honor on that." (TT at 1588).

The statement's significance, however, lay in clarifying an ambiguity created by defense counsel, who in his direct examination of petitioner had brought up the lie detector test in such a way that it perhaps was not clear to the jury that the test questions dealt only with the murder, not the drug

possession, issues, though the jury did learn that petitioner's bail was reduced as a result of the lie detector test. TT at 1285-86. The prosecutor was unable to clarify this ambiguity in his cross-examination of petitioner. TT at 1290-1300. Petitioner's attorney then further added to the confusion in his summation, possibly suggesting not only that the lie detector test wrongfully dealt with the drug matter, but that petitioner was thus questioned out of the presence of her attorney and was misled. TT at 1567-68.

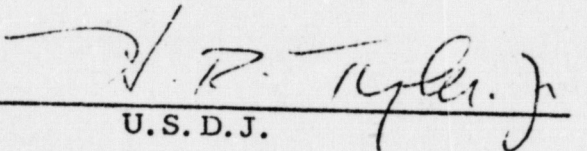
Though the proper procedure for the prosecutor would have been to call the state trooper as a rebuttal witness to testify to the test's limited subject matter, it was too late for such a step when the defense attorney gave his summation. Instead, the prosecutor in his summation stated flatly matters not clearly on the record - that petitioner had agreed to submit to a lie detector test only concerning the homicide and that the lie detector test was in fact so restricted, citing the state trooper passage, supra, in support of the latter claim.

In view of the tactics of the defense attorney in mentioning the lie detector test and hinting at its possible misuse by the government, and the ample evidence to justify petitioner's conviction for possession of drugs,

this court finds that the prosecutor's statement, though improper, clearly was not so serious as to deprive petitioner of a fair trial. United States v. Tramunti, _____ F.2d _____ (2d Cir. Slip Op. Nos. 253, 257, 260, 266-74, 301-02, 309 at p. 2164, decided March 7, 1975); United States v. Benter, 457 F.2d 1174 (2d Cir. 1972), cert. denied, 409 U.S. 842 (1972). Moreover, the trial judge charged the jury to disregard statements made by counsel or the court, TT at 1666. See Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

Having found ample evidence on the record to support the trial judge's denial of petitioner's constitutional claims relating to suppression of evidence and for this court's denial of her other constitutional claims, this court holds that no federal evidentiary hearing is necessary under 28 U.S.C. § 2254 and that petitioner's application for a writ of habeas corpus must be denied. It is so ordered.

Dated: April 4, 1975



U.S.D.J.

Notice of Motion to be Relieved of Order of
Former District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application
of
DEIDRE SMITH

74 CIV. 4399

NOTICE OF MOTION

for a Writ of Habeas Corpus
- against -

JANICE P. WARNE, Superintendent,
Bedford Hills Correctional Facility
of the State of New York,
Respondent.

PLEASE TAKE NOTICE that upon the Petition for a Writ of Habeas Corpus duly verified on the 7th day of October, 1974, the Order to Show Cause why the Writ should not issue made on the same date by the Honorable Harold R. Tyler, Jr. of this Court who has resigned from the bench prior to the making of this motion, the answer on behalf of the respondent by the Attorney General of the State of New York, dated October 31, 1974, the traverse to the answer and return duly verified by the attorney for the Petitioner on the 4th day of November, 1974, the brief on behalf of Petitioner duly filed with this Court on the 1st day of November, 1974, the brief on behalf of Respondent submitted on the 9th day of December, 1974, and the order of former Judge Tyler dismissing the application for the Writ without a hearing, together with memorandum dated April 4, 1975 [see New York Law Journal, April 9, 1975, U.S. District Court, Southern District, Decisions, Judge Tyler], the undersigned, on behalf of Petitioner, will move

this Court in Part I, Room 506, United States Courthouse, Foley Square, New York, N.Y., at 10:30 A.M., April 22, 1975, for an order, pursuant to Rule 60(b), Federal Rules of Civil Procedure:

- [i] Relieving Petitioner of the order of former Judge Tyler dismissing her application for the Writ without hearing;
- [ii] Granting opportunity to be heard in oral argument on the application for the Writ;
- [iii] Upon argument, issuing the Writ of Habeas Corpus as a matter of summary judgment or upon an evidentiary hearing; and
- [iv] For such other and different relief upon such terms as are just.

The grounds for this motion are the mistake and inadvertence of the Court in making its disposition of the application, the surprise reasonably occasioned under the circumstances of the disposition, and are more particularly specified in the affidavit and brief of the undersigned.

Yours, etc.

Sgd. FREDERICK J. LUDWIG

FREDERICK J. LUDWIG
Attorney for Petitioner
Office & P.O. Address
Suite 2206
60 East 42nd Street
New York, N.Y. 10017
MU 7-4990, 6380

TO:

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Office & P.O. Address
Two World Trade Center
New York, N.Y. 10047

[Affirmation by Frederick J. Ludwig,
same date, is omitted]

Dated, New York, N.Y.
April 12, 1975

Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application
of

DEIDRE SMITH,
Petitioner,

for a Writ of Habeas Corpus

- against -

JANICE P. WARNE, Superintendent,
Bedford Hills Correctional Facility
of the State of New York,
Respondent.

74 Civ. 4399

L.W.P.

NOTICE OF APPEAL
TO THE COURT OF
APPEALS

Notice is hereby given that DEIDRE SMITH, the petitioner above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the United States District Court for the Southern District of New York entered on April 4, 1975 by former Judge Tyler dismissing her application for a Writ of Habeas Corpus without any hearing.

Signed: FREDERICK J. LUDWIG

FREDERICK J. LUDWIG
Attorney for Petitioner
Suite 2206
60 East 42nd Street
New York, N.Y.
Tel. MU 7-4990

TO:

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Two World Trade Center
New York, N.Y. 10047

Dated, New York, N.Y.
May 2, 1975

Verified Petition for Certificate of Probable
Cause to Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application :

of :

DEIDRE SMITH, :
Petitioner, :

For a Writ of Habeas Corpus :

- against - :

JANICE P. WARNE, Superintendent,
Bedford Hills Correctional Facil-:
ity of the State of New York,
Respondent. :

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) Ss.:

74 Civ. 4399
L.W.P.

VERIFIED PETITION
FOR CERTIFICATE OF
PROBABLE CAUSE

The petition for a certificate of probable cause respectfully shows:

INTRODUCTION

This is a petition for a certificate of probable cause pursuant to the provisions of 28 U.S.C. § 2253 [3d par.] in connection with an appeal to the United States Court of Appeals for the Second Circuit from a final order entered in the United States District Court for the Southern District of New York dismissing an application for leave to issue a Writ of Habeas Corpus, without any hearing.

Unusual circumstances surrounded this order. The order was filed with memorandum at 3:21 P.M., Friday, April 4, 1975 [See time stamp, clerk's initials, crossing-out of initials "HRT" after entry of the civil number and substitution of "Pierce", and finally the entry in handwriting of an exclamation point [":"]]

on the initial typewritten page of the issuing Judge's memorandum. APPENDIX A, post]. The order and memorandum were served, according to a mimeographed notice accompanying the order and memorandum, on "DATE: 4-9-75", upon the petitioner "PRO SE" by mail, and also upon the Attorney for the Respondent [APPENDIX B, post]. Your petitioner was at all times represented by counsel in this proceeding whose name, address, suite number and telephone number was entered on all papers in this proceeding.

The clerk's exclamation point was, upon information and belief, occasioned by the following circumstances. On March 12, 1975, the President of the United States nominated the Honorable Harold Russell Tyler Jr., then a District Judge for the Southern District of New York, to be Deputy Attorney General of the United States. Petitioner's verified application for issuance of the Writ of Habeas Corpus was served upon the respondent on October 7, 1974, and pending before former Judge Tyler since that date. Then, in March, 1975, by order of the Chief Judge for the Southern District of New York, pending cases before former Judge Tyler were reassigned to other Judges in the Southern District. This case was reassigned to the Honorable Lawrence W. Pierce, United States District Judge for the Southern District of New York, and a notice to that effect was mailed to counsel for the petitioner in March, 1975 [APPENDIX C, post]. On Friday, April 4, 1975, former Judge Tyler announced to the press that he had submitted his resignation as a United

States District Court Judge and would assume his duties in the Executive Branch on Monday. Later on Friday, the order and memorandum dismissing the petition without any hearing, was filed by former Judge Tyler with the clerk of the United States District Court for the Southern District of New York. Under these circumstances, petitioner on April 12, 1975 moved before Judge Pierce for an order pursuant to Rule 60(b), Federal Rules of Civil Procedure, to be relieved of the order of former Judge Tyler on the grounds of mistake and inadvertence of the Court in making its disposition and the surprise reasonably occasioned by the circumstances of that disposition. That motion is still pending before the Court.

THE FACTS

On February 26, 1973, petitioner was sentenced in the County Court, County of Westchester, State of New York, to a maximum term of life imprisonment and a minimum period of fifteen years' imprisonment on each of two counts of an indictment, after trial and verdict of guilty on each count by a jury, the sentences to be served concurrently.¹ Each of the two counts in the indictment² charged in identical words the crime of possession of a dangerous drug in the first degree, the first count alleging an aggregate weight of sixteen ounces or more containing heroin, and the second count, in identical words, cocaine.³

1. Verified petition [hereafter, Pet.] par. THIRD.

2. Pet. par. TWENTY-FIFTH, APPENDIX F.

3. Id.

Upon appeal to a State intermediate appellate court, the judgment was affirmed without opinion.⁴ One Judge of the State's highest court denied leave to appeal.⁵

Application for a Writ of Habeas Corpus was made to this Court, pursuant to 28 U.S.C. § 2242, on October 7, 1974. Disposition occurred by order dated April 4, 1975. The verified petition was served personally upon Respondent on October 8, 1974. The petition contained thirty-six numbered paragraphs and nine lettered appendices. The answer of Respondent, dated October 31, 1974, and filed with the Court and served upon counsel for the Petitioner on the following day, merely denies "upon information and belief the allegations and statements contained in paragraphs 'Second', 'Twenty-Sixth', 'Twenty-Ninth' and 'Thirty-Second' of the petition". Each of these four of the thirty-six paragraphs contained in the petition states propositions of law and not of fact. A verified traverse on behalf of Petitioner was served and filed on November 6, 1974.

The case against Petitioner for possession of dangerous drugs arose out of the murder of one Bobby Madden in the public corridor outside his apartment, No. 15 A, 1841 Central Park Avenue, Yonkers, New York, at about 1:30 A.M., January 24, 1971 and the response of the police to the scene. The homicide remains unsolved.⁶

4. Pet., APPENDIX B.

5. Pet., APPENDIX C.

6. Id., par. FOURTH.

There were two eyewitnesses to the murder: Hannah Futuro who was leaving apartment 15 M at the time in the company of Sheila Altman. Both saw and recognized Bobby Madden as the door to 15 A opened and Madden left. Madden was in the process of closing the door when another male appeared in the hallway, struck Madden and shot him as he continued down the hallway until he dropped.⁷

The events immediately preceding Madden's fatal exit from 15 A into the public hallway were recounted by the only other person in that apartment, petitioner Deidre Smith. She was twenty years old and pregnant at the time. She had been lying in bed with Madden since about 8:30 P.M. watching television. At eleven o'clock, Madden announced that he was going downtown but was not yet ready to leave. He remained in bed until about 1:30 A.M. when he arose, dressed, stated that he would return in an hour and went out the doorway of 15 A into the public hallway. After a few minutes, Petitioner arose to get something to eat in the kitchen, heard a commotion in the hallway, looked through the peephole, put on clothing after hearing a

7. Id., par. FIFTH.

black man had been shot (Madden was the only black tenant in the sixteen apartments on the fifteenth floor), and left to discover that Bobby Madden was that man.⁸ Petitioner returned to apartment 15 A, put on her coat, took a locked box in which Madden kept his money and papers from a closet in his den, left the apartment and entered the elevator from which the first two police officers responding to the homicide had just left.⁹

The public hallway on the fifteenth floor confronting the police consisted of an area of 120 feet in length, running in a north-south direction, and seven feet in width. Sixteen apartments, three elevator banks in the center, and one stairwell opened on the public area. Apartment 15 A was immediately to the right of one of the elevators on the east side of the hallway. The body of Bobby Madden lay face down, thirty to forty feet from an elevator. A handgun, believed to be an automatic, lay on the left side of his body, not near the arm or hand of Madden. Five empty, spent shells were distributed all the way down the hallway.¹⁰

8. Id., par. NINTH.

9. Id., par. TENTH.

10. Id., par. SIXTH.

The crucial facts apparent to the arriving police and to neighbors who congregated in the public hallway since two of them witnessed the homicide were these:

- [i] Madden was the victim of a criminal homicide;
- [ii] The criminal agency was gunshot wounds;
- [iii] An automatic handgun and five spent shells lay in open view in the public hallway, and remained undisturbed as part of the scene of the homicide; and
- [iv] The homicide was in fact witnessed by two women who were able to identify the perpetrator as a male.¹¹

Solely based upon the testimony of police witnesses - and without reference to any evidence given by Petitioner - the events may be established that occurred on the fifteenth floor of 1841 Central Park Avenue, on Sunday morning, January 24, 1971, from shortly after 1:30 A.M. until about 4:30 A.M. when both police and Petitioner were there. During this period, Petitioner, together with the police, had been:

- [i] In the elevator, stopped at that floor;
- [ii] In the public hallway on the way from the elevator to apartment 15 B;
- [iii] In apartment 15 B;
- [iv] Again in the public hallway, on the way from apartment 15 B to 15 A; and
- [v] In apartment 15 A.

Officer Drexel of the uniformed force of the Yonkers Police Department was the first of two officers to appear on the scene. Drexel literally grabbed Petitioner at the elevator and took her physically. She struggled with him because he was grabbing her.¹²

¹¹ Id. par. FIFTH.

¹² Id. par. TENTH.

Officer Drexel stood guard over petitioner from the time of his physical removal of her from the elevator, through the public hallway on the Fifteenth floor to apartment 15 B, inside apartment 15 B during her detention in that apartment, during her removal through the public hallway from 15 B to 15 A, and during her detention in 15 A for the first two or three minutes.¹³

During the detention of petitioner in 15 B, Officer Drexel closed the door after he put her in there and interrogated her concerning the homicide. Petitioner answered that she did not see anything or anybody come to the door of 15 A.¹⁴ During his interrogation of petitioner, Officer Drexel determined that she lived in apartment 15 A. Other police officers from the Yonkers Police Department arrived: Detective Joel Parisi, a second grade, i.e., with additional compensation above his civil service rank of patrolman, and assigned to the narcotics squad, who was demoted to the patrol force in uniform with loss of additional compensation following this investigation; Lieutenant Frank Sardo, subsequently promoted to deputy chief of police of the department; and Sergeant Michael D'Ambrosio who accompanied the Lieutenant.

13. *Id.*, par. ELEVENTH.

14. *Ibid.* |

After Drexel informed Sardo and D'Ambrosio that the petitioner lived in 15 A, they announced, "[W]e will take her over to 15 A."¹⁵ Drexel swore at the trial, "It was one of my superiors that took her," one of the uniformed superiors who did it.¹⁶

The manner in which the police witnesses obtained entry into 15 A was explained in their testimony. According to Drexel, "I just followed, just followed, she went into her apartment on her own," and "it's possible" that there was a uniformed officer in front of her as she left 15 B.¹⁷ D'Ambrosio, who entered 15 A just behind his superior, Sardo, was let in by Sergeant Connally of the Yonkers Police Department emergency squad. Sardo observed Sergeant Connally standing in the hallway in front of apartment 15 A but could not recall who admitted him. Parisi followed petitioner "maybe ten feet behind her" into 15 A, recalled Sergeant Connally making a phone call from 15 B, and had no conversation with petitioner in 15 B about his entering 15 A. Parisi also invited a later arriving detective, Stypulkowski, into 15 A, but Stypulkowski insists that "The door was wide open and I looked in and I saw Deidre Smith sitting on the couch. * * * Detective Parisi was there, but I didn't see him until I came into the apartment."¹⁸

15. Id., par. TWELFTH.

16. Id., APPENDIX D, at page 364.

17. Ibid.

18. Id., par. FOURTEENTH.

Officer Drexel remained in 15 A briefly, "approximately maybe 2 or 3 minutes". During this brief period, Drexel observed eight additional police officers enter 15 A, making the total police complement an even dozen. During this brief period, petitioner was sitting down on a couch in the living room in apartment 15 A that comprised six rooms (two baths and a den). During this two to three minute period, there was a lot of activity around petitioner: the "maybe eight" additional officers who had entered 15 A began searching the apartment. "[T]hey were in the apartment opening drawers and stuff like that, going in the closets like looking for the murder weapon. * * * " During the fleeting few minutes during which petitioner sat on a couch in the living room guarded by Officer Drexel, "They opened a few closets and were looking in the bedroom you know. I didn't observe, I know they were going through the rooms though." "Right", testified Officer Drexel, they were looking all over the place. 19

Detective Parisi has never claimed any consent for him to search 15 A.²⁰ Yet he swore, "I searched the Den area * * *

19. Id., par. SIXTEENTH.

20. Parisi's claim is only that - unlike Sardo, D'Ambrosio and Stypulkowski - he was invited by petitioner to enter apartment 15 A: "I would like to ask you a few questions and she said. It would be alright if we went to my apartment and so I said fine." Transcript, Suppression Hearing at p. 192. "And she said all right and she said do we have to do it here, she said can we go to my apartment or something to that effect." Transcript, Trial at p. 476.

a small adjoining room which would appear to be like a den. * * * when I searched the den area, the closet of the den area is where I found this. * * * It was in a brown paper bag. * * * I have it marked here as three thousand three hundred and ninety bags of heroin." This evidence was held non-suppressible and admitted at trial against petitioner.²¹ The den contained in an adjoining room was at no time visited by petitioner during the two and one-half hour period of her detention in 15 A by a minimum of a dozen police officers. The search of the closet in the den was exploratory and not cursory: the closet had a door or doors that were closed and were opened by Parisi.²² Moreover, this closet contained men's shoes, men's shirts and men's jackets;²³ a similar exploratory search of another closet in the bedroom by Parisi turned up no contraband and was found by him to contain women's clothing.²⁴

Parisi took notes of questions and information of his interrogation of petitioner seated on a couch in the living room but admitted, "I threw the notes away."²⁵ Throughout the entire period on January 24, 1971 on the fifteenth floor of 1841 Central Park Avenue, beginning at about 1:30 A.M. when petitioner was seized at the elevator by Drexel, removed to apartment 15 B and interrogated there, taken to apartment 15 A and subjected to further interrogation in the living room, .

21. Pet., par. SEVENTEENTH.

22. Transcript, Trial at page 537-38.

23. Id. at page 541.

24. Id. at page 579.

25. Pet., par. EIGHTEENTH.

until immediately before her removal to the police station at about 4:30 A.M., no warnings were given petitioner about her constitutional right to remain silent or contact an attorney, and no claim is made by the police that any were given.²⁶ As to the significance of restrictions imposed by the police on petitioner's freedom of action in 15 A during her detention and interrogation there, her use of the bathroom, the bedroom to change her clothes and the telephone in the kitchen are illustrative of the surveillance by the police who numbered twelve in the apartment at the inception. "[S]he asked to use the bathroom, which she was permitted to do. * * * [A]gain she wanted to use the bathroom. She was permitted to use the bathroom again * * * [S]he went into the bathroom and she was instructed not to lock the door * * * I knocked on the door and insisted that she come out." "She asked to use the bathroom again. * * * I asked her not to lock the door at this point and I think that she left it slightly ajar. Just a trifle open and I asked the sergeant to stand there in front of it * * *". In the bedroom, "She was going through the changing routine again and she asked me to at least turn my back. I turned my back, but I could see her through the window, it was dark and you could see the reflection. She asked her girlfriend to hold the coat in front of her while she changed." "[S]he asked the lieutenant if she would be permitted to make a telephone call. Which she was permitted to do in the kitchen." "I accompanied her to the kitchen and she called up Thelma Grant. I was there, yes" and listened to the conversation.²⁷

26. Id., par. NINETEENTH.

27. Id., par. TWENTY-FIRST.

The seizure and detention of petitioner was accomplished without any prior judicial approval. Not until eleven days later on February 1, 1971 was application made to the County Court, County of Westchester, to hold petitioner as a material witness and to fix bail in the sum of \$1,000,000.00. The Court set bail at \$100,000.00 and remanded petitioner.²⁸

Fifty-one days after her seizure and detention, petitioner was first accused by indictment handed up on March 16, 1971 in two counts, otherwise identically worded, charging criminal possession of a dangerous drug in the first degree by knowing and unlawful possession of substances of an aggregate weight of sixteen ounces or more containing, in the first count, heroin, and in the second count, cocaine.²⁹

28. Id., par. TWENTY-FOURTH.

29. Id., APPENDIX F.

The Suppression Hearing

A hearing on petitioner's motion to suppress the tangible evidence seized by the police on January 24, 1971 as well as statements taken by them from her was held before County Judge John C. Couzens. The Judge candidly placed on the record, "that I have been informed that several police officers from the City of Yonkers will be called as witnesses in this hearing. That having spent upward of ten years in the City Court of Yonkers, I am personally acquainted with the police officers and am socially acquainted with at least one of them." A critical issue of fact in the hearing on suppression of the tangible evidence was which occupant of apartment 15 A - the deceased Madden or petitioner, his twenty year old pregnant girlfriend - had dominion and control over any narcotic drugs seized there. Sardo had testified that Madden "had a previous history of involvement in narcotics," and that there had been "some mention of it later that night by someone." But on cross-examination of the detective from the narcotics squad present on the scene, Parisi, objection was twice sustained to inquiry whether Madden had a record for dealing in narcotics. By decision dated December 29, 1972, with opinion otherwise unreported, petitioner's motion to suppress was in all respects denied. "This Court is mindful that while it sits back discussing the legal niceties of those events it must never lose [sic] sight of the fact that the events of that evening were not calm, but rather, chaotic. * * * Her consent was freely and voluntarily given. * * * All statements made by her were not made while she was in any sense of the word 'in custody'. She had freedom of movement and contact with friends and neighbors."30

Officer Drexel was produced by the prosecution for the first time at trial. His testimony was crucial on the questions of the seizure of petitioner in the public elevator, her forcible removal through the public hallway by him, his confinement and interrogation of her in another apartment, the arrangements made by his superiors to get her back into her own apartment, her interrogation in the living room of her apartment and the general rummaging of closets and drawers in other rooms within the first two or three minutes after her arrival there.³¹

Chronologically and logically on any matter of suppression, Officer Drexel as the first policeman on the scene and who first detained petitioner and who spent the first half hour uninterruptedly with her, should have been the first witness for the prosecution. Curiously enough he was not called at all in the suppression hearing. He was however summoned to the trial. After his testimony, the prosecution concedes that defense counsel, "Throughout the trial [he] attempted to show an unlawful entry and discovery of contraband and in summation again alleged the illegality of the entry and subsequent seizures".³² Throughout the trial, his efforts were unavailing, the typical ruling of the trial judge being, "Well, you can't contest it in this trial, unfortunately." ³³ Then on appeal, the prosecution earnestly argued, "That motion and the hearing thereon was the 'exclusive method of challenging the admissibility of evidence'" [citing the new Criminal Procedure Law § 710.70(3)].³⁴

31. Id., APPENDIX D.

32. Brief, Appellate Division, Second Dep't, page 16.

33. Transcript, Trial, at page 819.
See note 32.

34.

Issue of Guilt or Innocence and the Exclusionary Rule

The issue of fact in this case was which of the two occupants of apartment 15 A did "possess", i.e., did "have physical possession or otherwise [to] exercise dominion or control over tangible property" (N.Y. Penal Law § 10.00(8)), consisting of dangerous drugs seized after exploratory search of a closet in a den in that apartment and introduced in evidence over petitioner's objections at her trial:

[i] Deceased Bobby Madden, 39 years old and married, with a criminal record involving narcotics, who was assumed to have physical possession or otherwise to exercise dominion or control over guns and other contraband seized in the closet of his den that contained also shoes and items of raiment that were exclusively male; or

[ii] Petitioner, his 20 year old pregnant girlfriend, with no record of conflict with the law, and whose items of clothing were found by the police in their exploratory search in another closet in a different room - the bedroom - of that apartment.

The State courts resolved this issue against petitioner. But for the exclusionary rule, a serious miscarriage of justice in this case in which an innocent person has been convicted could not be corrected.

MISTAKE AND INADVERTENCE ON ISSUES OF FACT AND LAW

The learned District Court, in making its disposition by dismissal of the petition without hearing, overlooked and misapprehended crucial questions of fact and law presented by the record in this proceeding, and accordingly was mistaken and inadvertent with respect to these issues:

¶ As a matter of fact, contrary to the carefully worded memorandum of the Court, the testimony of Officer Drexel - a full transcript of which was appended to the petition - was not the "only testimony which might support petitioner's claim of coercion". Other police officers present in apartment 15 A testified about the necessity of obtaining their permission for Petitioner to go to the bathroom, use the telephone in the kitchen, or even to use the bathroom without one of them being present, or to use the bathroom without leaving the door ajar, or to change her clothing in the bedroom without one of them observing her [ante, page 9-10].

¶ As a matter of fact, that testimony was in no manner whatsoever "in part contradictory, in part inconclusive, [or] contradicted by the testimony of other policemen" with respect to Officer Drexel's seizure of Petitioner at the elevator, his forcible removal of her through the public hallway from the elevator to apartment 15 B, and his detention and interrogation of her behind a closed door in that apartment.

¶ As a matter of law, the misapprehension of these facts caused the Court to overlook their legal consequences in several cases brought to its attention: United States v. Di Re, 332 U.S. 581 (1948) [consequence of unlawful arrest upon subsequent search and seizure]; Davis v. Mississippi, 394 U.S. 721, 726-27 (1969) [id.]; Wong Sun v. United States, 371 U.S. 471, 484, 488 (1963) [exploitation of primary illegality]; United States v. Edmons, 432 F.2d 577, 584 (2d Cir., 1970) [id.]; Orozco v. Texas, 394 U.S. 324, 326-27 (1969) [failure to give prescribed warnings in interrogation outside a police station]; Schneckloth v. Bustamonte, 412 U.S. 18 at part E (1973) [burden of proof to demonstrate that consent was in fact voluntarily given, and not the result of duress or coercion, express or implied, on prosecution: automatic exclusion if subject is in custody].

¶ As a matter of both fact and law, the Court misapprehended the significance of Petitioner's testimony at trial in January, 1973 that the automatic weapon left lying in the public hallway, January 21, 1971, belonged to the deceased and not the killer. This circumstance at the time of the search and seizure has no significance. Assuming, for the sake of argument, that through some prescience the police knew at the time that this was the case, all of the evidence is to the contrary that the weapon could be found in apartment 15 A: there were two eyewitnesses to the homicide in the public hallway and that hallway was thronged with neighbors who would certainly not overlook the entry of anyone into 15 A.

As a matter of law, indulging every conceivable speculation about the weapon being in 15 A (in fact, it was never found there after the warrantless search), and assuming all the probable cause in the world that it could be found there, the warrantless search of apartment 15 A violated the Fourth Amendment. Coolidge v. New Hampshire, 403 U.S. 443, 455-57 (1971); Vale v. Louisiana, 399 U.S. 30, 33-34 (1970).

¶As a matter of both fact and law, the Court overlooked the significant circumstances that Parisi was a narcotics detective at the time of the homicide, that he was the first detective in a department with specialized units to arrive on the scene of this homicide, that narcotics were located in the court yard outside the building, that Parisi was subsequently disciplined by demotion and transfer, that he claimed no consent whatsoever to conduct any search in apartment 15 A, that Petitioner at no time was in an adjoining room - but rather under the control of at least a dozen police officers in the living room, that Parisi made an exploratory search of a closet containing men's apparel by opening its doors, and that he seized 3,390 bags of heroin from the closet [ante, pages 8 - 9].

¶As a matter of law, the seizure of that evidence violated the Fourth Amendment, Chimel v. California, 395 U.S. 752 (1969), its admission was justified by the prosecution on the basis of two decisions explicitly overruled in Chimel (395 U.S. at 768), and the application of Chimel to facts occurring more than one year and seven months after that holding is unquestioned.

¶As a matter of law, the identical judge who presided at the State trial and the suppression hearing was under a Federal Constitutional duty to reconsider his prior ruling at the trial after Officer Drexel then testified for the first time [ante, page 12].*

*At page 140 of this APPENDIX.

The events described by Drexel, based upon first hand participation, uncontradicted by the testimony of any other police officer or witness, and confirmed by other witnesses was: "So I grabbed the woman and detained her." She was struggling as he took her physically, "Because I was grabbing her." [Petition, par. TENTH, APPENDIX D]. Gouled v. United States, 255 U.S. 298, 312 (1921); Carroll v. United States, 267 U.S. 132, 162 (1925); Rouse v. United States, 359 F.2d 1014 (D.C. Cir., 1966). This is especially the case when no State discovery procedure is available to a defendant for prosecution witnesses and their identity, and the witness first produced by the State at trial is a principal prosecution witness. Mooney v. Holohan, 294 U.S. 103, 112 (1935).

WHEREFORE, your petitioner prays for an order granting a certificate of probable cause to appeal to the United States Court of Appeals for the Second Circuit from the order of the United States District Court for the Southern District of New York, filed on April 4, 1975, dismissing her application for a Writ of Habeas Corpus without any hearing.

Sgd. DEIDRE SMITH
DEIDRE SMITH

Sworn to before me

this 1st day of May, 1975.

Notary Public

/s/ **FREDERICK J. LUDWIG**

FREDERICK J. LUDWIG
Attorney for Petitioner
Suite 2206
60 East 42nd Street
New York, N.Y. 10017
Tel. MU 7-4990

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Memorandum Decision

In the Matter of the Application

of

DEIDRE SMITH
for a Writ of Habeas Corpus

#42187
MEMORANDUM *Pavia*

74 Civ. 4399 ~~UDT~~

-against-

JANICE P. WARNE, Superintendent,
Bedford Hills Correctional Facility
of the State of New York,

Respondent.

TYLER, D.J.

Petitioner, Deidre Smith, is presently serving a sentence at Bedford Hills Correctional Facility, Westchester County, New York. After a trial by jury in the County Court, Westchester County (Couzens, J.), she was convicted of two counts of possession of a dangerous drug in the first degree and sentenced, on February 26, 1973, to an indeterminate sentence of fifteen years to life on each count, to be served concurrently on each count.

MICROFILM

APR 04 1975

APR 4 3 21 PM '75
S.D. N.Y.
U.S. DISTRICT COURT

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Office of the Clerk
United States Court House, Foley Sq
New York, N.Y. 10007

DEIDRE SMITH
247 Harris Rd.
Bedford Hills N.Y. 10507

DATE 4-9-75

TITLE. U.S.A.ex rel SMITH -v- WARNE

DOCKET NUMBER PRO SE 74 Civ 4399

DECISION DATE 4-4-75

JUDGE Tyler

Sir

THERE IS ENCLOSED HERewith A COPY OF A DECISION
FILED AND ENTERED IN THE ABOVE ENTITLED PROCEEDING

c/c
LOUIS J. LEFKOWITZ
ATTORNEY GENERAL
STATE OF NEW YORK
TWO WORLD TRADE CENTER
NEW YORK, N.Y. 10047

Very Truly yours

RAYMOND E. BURGHARDT

by Joel Blum
Deputy Associate Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In The Matter of The
Application of
Deidre Smith

- vs -

Supt. Bedford Hills Corp

74 civ 4399 L.T.R.

Docket number

NOTICE OF
REASSIGNMENT

Pursuant to the memorandum of the Coordinating Clerk the above
entitled action is reassigned to the calender of

JUDGE Pierce

All future documents submitted in this action are to be
presented in the Clerk's office for filing and shall have the assigned

JUDGE'S INITIALS after the docket number.

DATED:

RAYMOND F. BURGHARDT, CLERK

BY Margaret A. Ryan

DEPUTY CLERK

Order of District Court Granting Certificate
of Probable Cause to Appeal

ORIGINAL

Index No. 74 Civ. 4399 Year 19 74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
In the Matter of the Application
of

DEIDRE SMITH

For a Writ of Habeas Corpus
- against -

JANICE P. WARNE, Superintendent,
Bedford Hills Correctional Facility
of the State of New York

VERIFIED PETITION FOR A
CERTIFICATE OF PROBABLE
CAUSE

FREDERICK J. LUDWIG
LUDWIG AND FRIEDMAN

Attorneys for Petitioner

Office and Post Office Address

60 East 42nd Street

Borough of Manhattan New York, N. Y. 10017

MU 7-62222

To

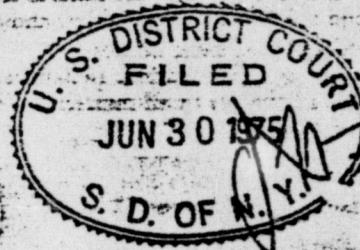
Attorney for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney for



RECEIVED

MAY 5 1975

CHAMBERS OF
LAWRENCE W. PIERCE, J.

COPY OF THE WRITTEN PAPER
RECEIVED
DEPARTMENT OF LAW
MAY 2 - 1975
NEW YORK CITY OFFICE
ATTORNEY GENERAL
H

ENDORSEMENT ORDER

The application herein for a certificate of probable
cause pursuant to 28 U.S.C. 2253 is hereby granted.

SO ORDERED.

Dated: New York, New York
June 25, 1975

Lawrence W. Pierce
LAWRENCE W. PIERCE
U. S. D. J.

MICROFILM
C661107107

Forma Pauperis

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

T 4708

In the Matter of the Application
ofDEIDRE SMITH, Petitioner-Appellant,
for a Writ of Habeas Corpus

- against -

NOTICE OF MOTIONJANICE P. WARNE, Superintendent,
Bedford Hills Correctional Facility
of the State of New York,
Respondent-Appellee.

PLEASE TAKE NOTICE that, upon the order of former District Judge Harold R. Tyler, Jr. dismissing an application for leave to issue a Writ of Habeas Corpus, without any hearing, filed on April 4, 1975, upon a notice of appeal filed on May 2, 1975, upon the order of District Judge Lawrence W. Pierce, made on June 25, 1975, granting a certificate of probable cause for such appeal, pursuant to the provisions of Title 28 U.S.C. § 2253, and upon the affidavit of the petitioner-appellant for leave to proceed in forma pauperis, sworn to on the 20th day of May, 1975, copies of the last three documents annexed hereto, application will be made to this Court in the Courtroom on the 17th Floor, United States Courthouse, Foley Square, New York, N.Y., at 10:30 A.M., July 22, 1975, or as soon thereafter as counsel may be heard, for an order pursuant to the Criminal Justice Act, as Amended, Title 18 U.S.C. § 3006A, for an order appointing the undersigned as counsel to the petitioner appellant in this proceeding .

Yours, etc.

/s/ FREDERICK J. LUDWIG

FREDERICK J. LUDWIG
Attorney for Petitioner-Appellant
Suite 2206, 60 East 42d Street
New York, N.Y. 10017
MU 7-4990

Forma Pauperis

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

T 4708

In the Matter of the Application
of

DEIDRE SMITH,
Petitioner -Appellant,

AFFIRMATION

- against -

JANICE P. WARNE, Superintendent,
Bedford Hills Correctional Facility
of the State of New York,
Respondent-Appellee.

STATE OF NEW YORK)
COUNTY OF NEW YORK) Ss.:

FREDERICK J. LUDWIG, being duly sworn, as a lawyer duly
admitted to practice in the courts of the State of New York and
in this Court, under penalty of perjury, affirms as follows:

Upon the affidavit of the petitioner-appellant, sworn to
on the 20th day of May, 1975, that she is financially unable
to provide counsel in this proceeding, and having ascertained
that she desires that the undersigned continue with her applicat-
ion for leave for issuance of a Writ of Habeas Corpus, your
affirmant states that he is fully acquainted with all of the
issues of fact and questions of law presented on this appeal
and has represented the petitioner-appellant in the District
Court below on her application.

WHEREFORE, the Petitioner-Appellant, through the under-
signed, prays for an order, pursuant to the provisions of Title
18 U.S.C. § 3006A, appointing your affirmant as her counsel in
this proceeding.

Dated, New York, N.Y.
July 16, 1975

/s/ FREDERICK J. LUDWIG
FREDERICK J. LUDWIG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application
of

DEIDRE SMITH,

Petitioner,

for a Writ of Habeas Corpus

- against -

JANICE P. WARNE, Superintendent,
Bedford Hills Correctional Facility
of the State of New York,

Respondent.

74 Civ. 4399

L.W.P.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) Ss.:

DEIDRE SMITH, being duly sworn, deposes and says that:

I am the petitioner in the above-entitled proceeding.

I make this affidavit in support of my application to proceed and appeal, if necessary, in this proceeding in forma pauperis, without being required to pay fees and costs or to give security for them.

I am presently confined to the Bedford Hills Correctional Facility of the State of New York, located at 247 Harris Road, Bedford Hills, County of Westchester, State of New York, and have been continuously so confined since February 26, 1973.

On that date, your petitioner was sentenced in the County Court, County of Westchester, to a maximum term of life imprisonment

~~and a minimum term of fifteen years on each of two counts of an indictment, the sentences to be served concurrently.~~ Each

count charged your petitioner in identical words with the offense of possession of a dangerous drug in the first degree under the laws of the State of New York, the first count alleging an aggregate weight of sixteen ounces or more of heroin, and the second, an identical weight of cocaine.

The central event leading up to these charges against your petitioner was the killing of one Bobby Madden, 39 years of age and married, who resided in - apart from his family - and paid the rent for apartment 15 A, 1841 Central Park Avenue, Yonkers, New York. The killing took place about 1:30 A.M., January 24, 1971, in the public hallway on the fifteenth floor of that building and was actually witnessed by two of the building's tenants who reported to the police that the perpetrator was a male who struck Madden and followed him down the hallway firing several shots at him from a handgun. The homicide remains unsolved. Your petitioner was physically seized by a uniformed police officer who responded to the scene as she entered the elevator at that floor, literally carried by him to the apartment of a neighbor, and confined and interrogated there by him. Then her removal to apartment 15 A was arranged and she was interrogated in the living room of that apartment. Meanwhile, about a dozen police officers, without procuring any search warrant whatsoever, ransacked and rummaged apartment 15 A. In an adjoining room called a den that belonged exclusively to Bobby Madden, the doors of a closet were opened. In the closet were articles of clothing that were exclusively male, guns, and 3,390 bags of heroin. Fifty-one days later, petitioner was charged by indictment with criminal possession of those bags of heroin, as well as other dangerous drugs found in and about apartment 15 A. The police have conceded that at no time was there any probable cause to believe that your petitioner was the perpetrator of the homicide that they were investigating. The police have further conceded that at no time did they have the slightest suspicion

that your petitioner was armed with a weapon. Nevertheless, your petitioner was confined by the police until eleven days later when the State prosecutor sought that she be held as a material witness under bail of "\$1,000,000.00". The court set bail at \$100,000.00 and remanded your petitioner. Only after petitioner submitted herself to a lie-detector test conducted by the New York State Police, and presumably successfully passed that test, did the prosecutor agree to her release on bail.

On the night of the occurrence, your petitioner was twenty years old and pregnant. Your petitioner met the deceased Bobby Madden when she was nineteen. At no time, either on the night in question or at any time prior to that night, has your petitioner ever had possession or control or dominion over any dangerous drugs. Your petitioner is totally innocent of the charges upon which she was convicted and is presently confined.

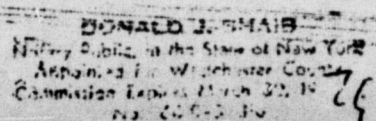
Your petitioner has no funds, and in her present condition of confinement, cannot earn any remuneration. My mother, Marv-
elle Smith, is employed daily in a restaurant and bar located on
Lenox Avenue in Manhattan. She earns about \$100 a week. From
her earnings, she pays rent for an apartment of \$150 a month,
and provides for the support of my three year old son.

WHEREFORE, your petitioner prays for an order authorizing her to proceed, and appeal if necessary, in this proceeding in forma pauperis, without being required to pay fees and costs or give security for them.

Dedra Smith

Sworn to before me this
20 day of May, 1975

Small / Hat



Order of the Court of Appeals Granting Leave to
Proceed in Forma Pauperis

B 30

75-2105

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second
Circuit, held at the United States Court House, in the City of New York, on the
23th day of July, one thousand nine hundred
and seventy-five.

In the Matter of the Application of
Deidre Smith,
Petitioner,

v.

Janice P. Warne, Superintendent,
Bedford Hills Correctional Facility
of the State of New York,

Respondent.

It is hereby ordered that the motion made herein by counsel for the

appellant

~~appellee~~~~petitioner~~~~respondent~~

by notice of motion dated July 16, 1975 for leave to proceed in forma
pauperis and for the appointment of counsel

be and it hereby is granted

~~denied~~

GRANTED

It is further ordered that

GRANTED

WILLIAM H. ADAMS

Circuit Judge